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Private Higher Education: The Job Ahead

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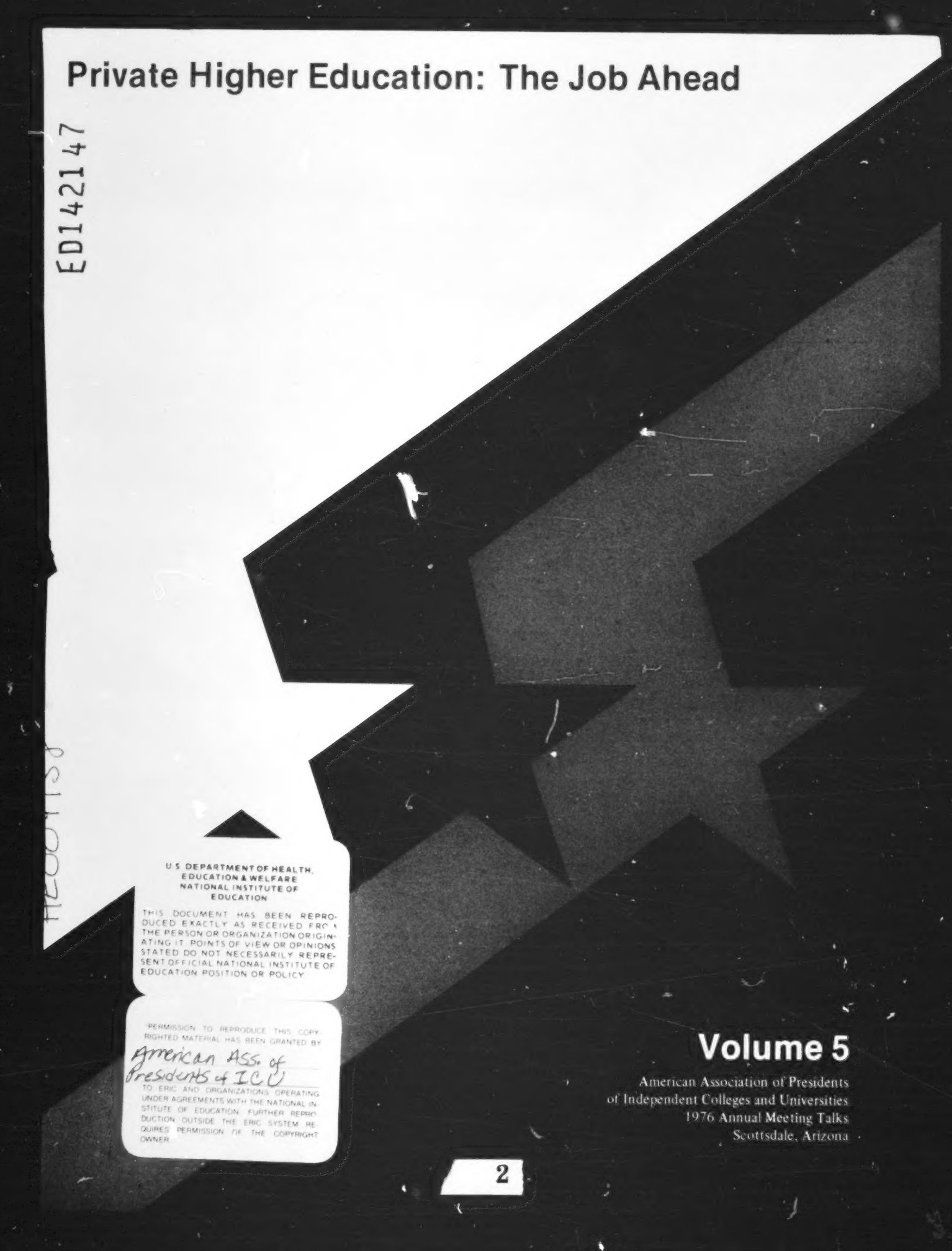

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Volume 5

American Association of Presidents
of Independent Colleges and Universities
1976 Annual Meeting Talks
Scottsdale, Arizona

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Preface

The American Association of Presidents of Independent Colleges and Universities was founded to provide an opportunity for the presidents to exchange views and compare experiences, to examine common problems and seek answers to them, and to take formal action on matters of special concern to private college presidents.

Membership is open to the chief executive officer of any private college or university that has regional accreditation.

At the annual meeting held in Scottsdale, Arizona, in December 1976, it was voted to publish the formal speeches for the benefit of both members who could not attend and others interested in higher education.

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Sen. James L. Buckley

Government and Independent Higher Education

by Senator James L. Buckley

R. Cons. — N.Y.

A former business man and attorney, Sen. Buckley was elected as the candidate of New York's Conservative Party in 1970 and currently serves as a member of the Senate Republican Policy Committee. A man of "universal interests" he has spoken out frequently on the need for a strong national defense and the Buckley bill, now public law, corrects some abuses in the handling of children's school records. He has pushed for a tougher U.S. posture on international drug traffic; has introduced legislation which would create a special cost of living index for the elderly, and is a frequent spokesman for free enterprise. His committee assignments include Senate Budget Committee, the Commerce Committee and the Committee on Public Works. He is also a member of the Joint Atomic Energy Committee. He received his B.A. degree from Yale and his law degree from Yale Law School.

First let me say that I find a certain irony in the fact that an involuntarily retired senator should be asked to address a meeting whose theme is the "Voluntary Society."

When I discovered that Mr. Martin Gerry, Director of HEW's Office of Civil Rights, is going to be here tomorrow I thought for a moment to ask him whether HEW could reverse the decision of the voters of New York. After all, as one whose official designation is Conservative Republican, I am a distinct minority of one in the Senate. The argument could be made that instead of having these things decided by votes, HEW should impose goals and timetables on the Congress so that Conservative — Republicans can be properly represented.

But, of course, governmentally imposed goals and the time-tables to achieve racial or ideological balance have no place in a free society, whether it be in politics or in education; and your association is concerned with just that—the conditions essential for the preservation of freedom, in your case, academic freedom.

And so you have jealously defended the diversity and independence of private colleges and universities against the homogenizing, pre-emptive compulsions of the state. Indeed, your association has fought the good fight with such diligence that your president, Dr. Dallin H. Oaks, was moved to write as follows in your September, 1976, *Report*: "The purposes of this association have sometimes been misunderstood, occasionally by its own members and almost invariably by others. 'They are a reactionary organization against federal aid' is the epithet heard. This damning misunderstanding must be corrected."

I sympathize with Dr. Oaks' concern; and so I hasten to assure you that I have always thought of you as a thoroughly *enlightened* organization against federal — or at least against the political — intervention that seems inevitably to follow the federal dollar.

Now we would all agree that politics and education, at their best, are worthy endeavors. But they can, when joined together, have unexpected and undesirable effects upon one another. The first half of the equation — the impact of politics upon education — has been clear enough over the past decade. Schooling at all levels is being made an instrument of public policy. **Both grade schools and graduate schools, and everything in between are expected to be the cure-all for everything that may or may not be wrong with our society. What the economy does not produce, what the political system does not deliver, the schools are expected to accomplish.**

And to make sure our schools do deliver whatever it is we think they ought, we have turned increasingly to Washington — as we have been turning to the federal government in recent years for answers to just about every other problem, real and imagined. In the case of education, it was the sight of Sputnik circling the globe 19 years ago that provided the excuse for the federal government to intrude into education to any significant degree. We needed more scientists and engineers to match the Soviet Union's, and so the Congress obliged with major infusions of cash for our schools and universities. Skeptics were told that this federal cash would never have strings attached, that we weren't opening the doors to federal control or domination of education.

Well, the intervening years have seen most American colleges become wholly dependent on the flow of cash from Washington; and you know better than I the strings that now come attached to those federal dollars.

A few brave institutions — Brigham Young University and Hillsdale College being two conspicuous examples — have sought to avoid federal dictation by steadfastly refusing any form of

federal funding. But now, as you also know, the Department of Health, Education and Welfare is battering at their doors, asserting the preposterous claim that, if so much as a single student at a school receives veterans benefits or a federal student loan, then the entire institution and all its student activities may be considered to be federally funded.

We have not quite reached 1984. But one can see the pages of the calendar flipping by. And some of you with long memories may recall that we were warned in advance that this federal meddling, this bureaucratic interference, this governmental control of our schools would be the inevitable consequence of federal financing for education. One of those who so warned us some 15 years ago was a relatively unknown Senator from the State of North Carolina. His plainly spoken warnings about the potential abuse of federal authority were considered, way back then, quaintly Southern and out of date. But once again, Sam Ervin has had the last laugh. Unfortunately, he became a national hero too late for the general public to heed his earlier admonitions concerning federal involvement in education.

I must confess that I am not entirely guiltless in this regard. It seems as if every university administrator whom I have met within the last two years wants to complain about something called the Buckley Amendment or, more formally, the Family Educational Rights and Privacy Act of 1974. I regret that that measure, which guarantees the privacy of student records and ensures access to them by students and, when appropriate, parents, has given administrators so many headaches. And rather than adding to the regulatory burdens of our schools, if it had been possible to eliminate all federal regulations, I would have sought to do so. **But that was not possible, and so I tried to do the next best thing: to ensure that federal authority over our colleges is directed toward the protection of individual rights.**

As it is, the Buckley Amendment has had some unforeseen benefits. It has within a remarkably short time convinced many university administrators — among them President Kingman Brewster of Yale — that federal involvement in education is not the answer to all their problems. Not suprisingly, many of those converts are not especially appreciative of the Senator who helped them learn a painful truth: that in the end, the cause of education will suffer from its growing dependence on what are essentially political judgments by the federal government.

But the same thing can be said of the impact of too much of present-day education on the political process. Mustering up my courage to say this, I would like to suggest that the course of education in recent years has damaged American politics as much as politics has damaged education. By that, I mean that all too often the content of higher education, and the attitudes with which it is transmitted, is producing college graduates whose preparation for the duties of citizenship is "insufficient for our times." That phrase — "insufficient for our times" — may have a familiar ring to it. It was not too long ago that some educators were using it as their reason for throwing out long-established courses and requirements in order to replace them with what they felt their students would find to be more "relevant" material. Constitutional history — and history itself, for that matter — seemed less important for the problems of the moment than seminars on the daily news. **The philosophic and theological foundations for Western Civilization's choice of individual rights were neglected, while student reading lists emphasized philosophies of mobbish materialism: from Prudhon and Sorel to Jerry Rubin and Eldridge Cleaver.**

Now, those literary gentlemen are instructive; for they demonstrate just how much nonsense about human society can be condensed between the covers of a book. And believing as I do in the free market, in the realm of ideas as in all else, I certainly would not want any author banned or disregarded. But it is time we recognize that, for most of the political decisions they will ever face, the college graduates of 1977 will find the principles, the guidance, and the wisdom they need, not in the writings of Mao or Marx or Marcuse, but in those of Jefferson and Madison and Marshall.

The class of '77 will confront a tight job market next spring, and I appreciate their dismay in discovering that their degrees no longer bring job security with them. But what has prepared them to understand the reasons why the American economy is so badly out of kilter? **In whatever exposure they may have had to economics, did anyone explain to them that the evidence of all past experience has demonstrated how governmental management of the economy inevitably cripples productivity and thwarts prosperity?** No wonder there is enthusiasm for proposed legislation to maugurate centralized economic planning in the United States and put millions of persons on the public payroll, all under the slogan of "full employment."

Granted, my analysis of this matter is opinionated. But, then, so are most economic courses. But I might buttress my argument by quoting an outstanding authority on governmental control of the economy, someone with whom I rarely agree. "In a country where the sole employer is the state," said Leon Trotsky, "opposition means death by slow starvation. The old principle: Who does not obey shall not eat."

I wonder whether, in their courses in political science, the graduates of '77 will have been exposed to Trotsky's candid analysis of our possible future. (Come to think of it, the future is already here, as far as most American schools and colleges are concerned. How else explain the power that overwhelms educators when faced with an ultimatum that is backed by the threatened withholding of federal funds?)

You may be wondering: is not the intolerant Senator merely seeking to have his views, rather than those of others, taught to impressionable students? Not at all. I dread the thought that any federal official, myself included, could meddle with the substance of education. That is why I have been alarmed by federal funding for the highly controversial M.A.C.O.S. program — not because it is controversial, not even because I find its amoral premises to be repugnant, but rather because it has involved the federal government in the development and marketing of textbooks. That involvement is even more objectionable to me than is the federal subsidy of those textbooks to the tune of $7,000,000 in public funds. Like all places that are holy, the marketplace of ideas should be kept strictly off limits to government.

I do not expect my views — in economics, philosophy, history or for that matter tonsorial styles — to be accepted as orthodoxy. I only ask that they be allowed to compete with others in the raucous freewheeling clash of opinions which constitutes the life of the mind and justifies the ideal of academic freedom.

That lofty principle, to which we all profess agreement, is imperiled by the juggernaut trend toward monopoly in education. Private institutions are facing ominous threats to their very existence. They are competing against publicly-funded rivals. And in that contest, in which political clout matters more than excellence, the smart money is not on an independent challenger.

Most of us would consider that situation intolerable in any other segment of our national life; for the effects of centralization and monopoly in schooling are no different from the effects of a sugar monopoly, transport monopoly, or for that matter, one-party government. By its very nature, monopoly tends to arrogance and abuse. It discourages innovative criticism and becomes complacently contented with itself. It tolerates no diversity. And, unless we restore and strengthen consumer control of education, monopoly will be the future of schooling in America.

For the sake of learning, I do not want this to happen. For the sake of the individual liberties we all cherish, it must not be allowed to happen. For diversity in education is an essential element in the preservation of our free society.

The Marxist view — that power comes from controlling the means of production — is terribly simplistic. In a modern, technotronic culture like ours, the means of production are counterbalances in many hands, each of which checks the other's power. But the means of education — now that's a different matter. In the American experience from the Colonial Period to the present day, the cultural survival and political clout of minorities — be they religious, racial, or ideological — has depended in significant part upon their ability to control the means of their own education. **That is why the American educational system -- if such an orderly word can apply to such creative disorganization -- has always been fragmented. It has been not only divided, but divisive, deliberately perpetuating differences in beliefs and values. Need we be reminded that our most venerable colleges spring from old religious feuds; that our proudest state institutions of learning were, in their origins, as much the affirmation of localism as they were commitments of wisdom?**

I do not believe that independent colleges can rely upon the good will of public officials for their survival. I have too great a familiarity with public officials. In education as in all else, true freedom is a matter of financial independence from government. That is why I have proposed legislation to strengthen consumer control of education through a system of tax deductions for tuition payments. It is why I support replacing the maze of string-ridden categorical grants-in-aid programs for schools with a special form of revenue sharing for education. Whatever may be the shortcomings of local and state school administrators, I trust their judgment far more than decisions made by remote bureaucrats in Washington. Academic freedom is too precious to exchange for a mess of federal pottage even when it comes from the bounty of HEW, and learning is too fragile a treasure to be entrusted to the clumsy care of a central government.

None of this, I realize, will fully remedy the two problems which I addressed earlier in these remarks: the politicalization of education and the failure of too many educational institutions to gear their teaching to what I like to think are eternal verities about mankind, society, and liberty. But we can move in the right direction as long as we are not timid about asserting our individual rights in the face of governmental power, and about making colleges as responsive to their consumers as businessmen are expected to be to theirs.

This is all possible so long as we remain essentially a voluntary society, so long as we continue to recognize that this country owes its vitality not to government but to the fact that Americans have enjoyed a freedom to pursue their own ends in their own ways to an unparalleled degree. **The voluntary society will survive, but only if organizations like your own are willing to continue the struggle against the growing pressure to yield to centralized direction over just about every aspect of American life. Too much is at stake -- not just for education, but for the life of freedom -- for you to do less than your intelligent and energetic best to protect the privacy of private initiatives, private direction, and private choice in American society.**

Federal aid to education is a fact of current life that is not apt to go away. But the pressures of federal domination over American education can be resisted if the will is mobilized. New ways of channeling federal funds must be devised. Furthermore, we can insist that federal functionaries be required to submit to elementary due process before arbitrarily withholding funds from schools in order to coerce compliance with orders of often questionable legality. With proper

ground work. I know this last can be accomplished in the next Congress because this past summer the Senate came within two votes of adopting an amendment of mine that would have achieved this end.

Increasing numbers of the public are coming to share your concern for the future health of American independent education. You can mobilize this potential support and work with your natural allies in private primary and secondary education, and with friends in the Congress to enact the necessary safeguards. I fervantly hope you will, because all of us who believe in the voluntary society understand how important it is that you achieve your goals.

It should be self-evident from everything I have said this evening that I believe that government officials — as opposed to the parents, students, and taxpayers who foot the bills for schooling — should have as little as possible to do with the shape of education. And now that I am about to be involutarily returned to private life, I want to assure you that I shall be working in any way I can to help you keep those politicians in their place.

Thank you.

Equal Opportunity and Government Discrimination

by Leonard J. Theberge

President,
National Legal Center for the Public Interest

A native of Long Island, N.Y., Mr. Theberge is currently President of the National Legal Center for the Public Interest in Washington, D.C., a non-profit tax exempt foundation working to present a balanced point of view within the judicial system of the need for environmental protection, conservation, and economic growth. He has a bachelor's degree from Columbia College, his Bachelor of Laws degree from New York Law School and holds a master's degree from Oxford University in England. He has served as attorney with the Federal Trade Commission, the U.S. Department of Justice and the Eastern District of New York. He also served as Managing Editor for the INTERNATIONAL LAWYER publication at the ABA and as International Legal Counsel with the Upjohn Company in Chicago.

Ladies and gentlemen: Thank you for the opportunity to be in such distinguished company and to address the topic of equal employment and government discrimination in employment with special emphasis on your academic community.

The best description of equal opportunity comes from the final speech of HEW Secretary Caspar Weinberger when he left government service:

"The real social agenda of America, still unfinished, is to discover and reward excellence wherever we find it — under a black skin, a white skin, in a female or male, a Catholic, Jew, a Protestant or an agnostic. That is the real purpose of equal opportunity."

GOVERNMENT PERVERTS OBJECTIVE

There is in our society a broad based consensus which supports the rightness of and the need for equal employment opportunities for all Americans regardless of their color, race, religion or sex. Yet today in attempting to implement a federal program to insure this national goal, various agencies of that government have perverted the original objective, encouraged discriminatory quotas, created confusion and alienated a large segment of the public. In examining the problem, which Professor Nathan Glazer aptly describes as affirmative discrimination, I shall review the legislative, administrative and judicial highlights of Affirmative Action, trace its development, explain what NLCPI is doing and attempt to offer a possible remedy to this problem.

HISTORICAL BACKGROUND

The concept of government concern and initiative to ameliorate the condition of minority groups dates back to the administration of Franklin Delano Roosevelt. While in terms of today's expectations, little may have been accomplished, President Roosevelt (Executive Order No. 8802)

in 1941 banned discrimination in defense industries. More recently, the term "Affirmative Action" became a program of the Kennedy Administration, which required federal contractors (Executive Order 10925) to act affirmatively to recruit workers on a non-discriminatory basis. The Civil Rights Act of 1964, 42 U.S.C. Section 2000(e), is the most important federal statute requiring non-discrimination. Title VII of the Act, as amended by the Equal Employment Opportunity Act of 1972 (P.L. 92-261), bans employment discrimination because of race, color, sex, religion or national origin. In general, the Act covers almost all private employers engaged in an industry affecting commerce and includes public as well as private educational institutions. The Act can be enforced by lawsuits or administrative proceedings before the Equal Employment Opportunity Commission initiated either by an individual or EEOC, itself.

The Act provides that its contents shall not be interpreted to require "preferential treatment" to remedy racial, sexual or other "imbalance" in a work force. Section 703(j), 42 U.S.C. Section 2000 e-2(j).

The term Affirmative Action took on new meaning and direction when civil rights activists argued that legislation alone would not erase past injustices and provide employment opportunities to minority groups. Their arguments were not without merit. Treating complaints as a case by case basis is arduous, time consuming, and can take years. Many victims of discrimination are incapable or reluctant to file a complaint.

With this thought in mind, President Johnson in 1965 issued an Executive Order *11246* calling for Affirmative Action in the elimination of employment discrimination among federal contractors *without defining precisely what that term was intended to mean.* Initially, compliance with this Executive Order was measured by such evidence of acting affirmatively, such as advertising the fact of being an "Equal Opportunity Employer," and seeking qualified minority applicants from sources that may not have been used in the past. Executive Order 11246 was amended by Executive Order 11375 which is the latest in a series of orders dating back to Franklin Delano Roosevelt. Sanctions under this order, which bans discrimination by federal contractors who employ about one third of the U.S. work force, provide for termination of existing contracts and denials of future ones.

AFFIRMATIVE ACTION-IMPRECISE

The imprecision of the term "affirmative action" let to a working out of a definition by the bureaucracy responsible for implementing the Executive Order through regulations and guidelines.

The Department of Labor which includes the Office of Federal Contract Compliance became the main agency for implementing the new policy and issued Revised Order No. 4 in May, 1968, which requires every significant federal contractor to develop an Affirmative Action program. Due to the size of the federal government and the contracts it dispenses, this meant just about every sizeable private institution.

While the federal program was developing, and even today, the term "affirmative action" has two contradictory meanings. *One* meaning embodies the concept of preferential treatment in the sense of favoring one group over another. A *second* definition defines affirmative action as "measures that aid members of some groups without impinging on members of other groups- and are equally available to all persons who need them.

The first definition has given rise to the descriptive terms "affirmative discrimination" and "reverse discrimination" which connotes granting preferential treatment to members of a selected group over better qualified members of different groups. These terms dramatize a new form of discrimination initiated and encouraged by the federal government. Preferential treatment, not based on rational meritorious considerations, is the opposite of open and equal employment.

In 1969 the statistical rule that had been used in voting and school busing cases to determine if discrimination existed and should be remedied was introduced into employment discrimination cases brought against crafts unions under the Civil Rights Act of 1964. The argument was made in the courts that statistical disproportion in employment could constitute a *prima facie* case of discrimination and the remedy embodied in the Philadelphia Plan included fixing quotas for employment of minorities.

HARD CASES BAD LAW

The adage among lawyers that hard cases make bad law was born out. The deepseated practices of building crafts unions, often directed to protect ethnic job interests, did discriminate against other groups. The cities were in turmoil in the late 1960's and unemployment in the building trades was a problem. The court remedy, unfortunately, is worse than the illness for it legitimized under court order discriminatory quota systems designed to remedy past injustices. The proponents of quotas for minorities and women argue that discriminatory quotas are benign when they are "minimum" quotas designed to include, rather than exclude, certain groups. What they ignore is the obvious fact that a "minimum" quota for one group establishes a "maximum" quota for members of other groups.

As the government and civil rights groups pushed their claims for preferential treatment against the labor and business community, there was little or no concern expressed in the academic community over the violation of the principle of equal opportunity for all Americans or the abuse of power by the federal government.

HIGHER EDUCATION

However, in the 1970's this lack of

concern changed, because a major emphasis in the fair employment policies of the federal government was directed towards higher education. The insistent demands of the contract compliance officers from the Office of Civil Rights in HEW on the universities to set goals and timetables for employment was met by the universities with token resistance. University administrators fearing a cutoff of vitally needed federal funds, and faculties suffering from a psychological "collective guilt" syndrome, caused universities to react as if they were guilty of whatever unnamed and unknowable "crime" was alleged by HEW. Although a spate of articles protesting excesses of HEW and certain university administrators appeared in academic and popular publications, there has been no organized, sophisticated program on either the public relations or the legal fronts to counteract government excesses. This was very similar to the response of the business community.

Some people had hoped for stronger moral leadership from the academic community to oppose a discriminatory government program that was applied with a heavy hand. One expects businessmen to weigh the costs of compliance against non-compliance and reach a decision that best protects his stockholders' interests. One expects that universities would look beyond the financial calculation to the principle involved and oppose an attempt by the federal to foster and encourage discrimination through "goals" and "timetables."

We will note later that some universities who in their zeal to comply with HEW, implemented discriminatory quota programs, are now being challenged in the courts by faculty members excluded from employment or advancement.

JUDICIAL TREATMENT

The Supreme Court has not directly addressed the issue of discriminatory Affirmative Action practices in either university hiring or promotion, although it came close to the parallel but distinct issue of university admissions in the *De Funis* case. The *Bakke* case has presented the issue of discriminatory admission policies squarely before the Supreme Court. Alan Bakke, a white applicant to the University of California at Davis Medical School, was denied admission solely on the basis of discriminatory racial criteria for admissions. In a 6 to 1 decision the California Supreme Court held that Bakke had been denied equal protection under the 14th amendment to the Constitution. It stated "a quota becomes no less offensive when it serves to exclude a racial majority."

Race has been traditionally regarded as a suspect classification, justified only in meeting pressing needs *Korematsu v. United States*, 323 U.S. 214 (1944); *Loving v. Virginia*, 388 U.S. 1 (1967). Race may not be used to exclude people from professional education or employment. *Sweatt v. Painter*, 339 U.S. 629 (1950). In the *Brown* case, racial segregation was held to carry a stigma of inferiority that violates equal protection under the law. *Brown v. Board of Education*, 347 U.S. 483 (1954).

As pointed out above, the Supreme Court has held that mathematical ratios are proper in school desegration cases but these cases have dealt with dismantling of *de jure* segregated school systems *Swann v. Charlotte-Mecklenburg Board of Education* 402 U.S. 1, 24 (1971).

There are a number of lower court cases that have directly addressed the reverse discrimination issue in both private and public employment and the overwhelming majority of decisions condemn it. In *Cramer v. Virginia Commonwealth University* a federal judge in Richmond found that VCU had engaged in "injurious and cruel" reverse discrimination by denying a white male his right to "equal employment." Dr. Cramer, a temporary appointee in VCU's Department of Sociology and Anthropology and a qualified candidate for permanent employment, was advised that his application would not be considered because the Department only considered applications from females. This case is on appeal to the 4th Circuit.

In *Weber & Kaiser Aluminum & Chemical Corp.*, 12 FEP Cases 1619, 12 FPD (E.D.La. 1976), the district court struck down a collective bargaining agreement between Kaiser and the United Steelworkers of America union where that agreement contained a thinly disguised quota system imposed in favor of minority groups who had not previously been discriminated against. The *Weber* case is on appeal to the 5th Circuit.

NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST

The National Legal Center for the Public Interest is a non-profit, tax-exempt public interest law organization dedicated to preserving traditional values through responsible spokesmanship in the judicial system. As President of NLCPI, I commissioned a study entitled "Affirmative Action in University Faculty Employment as an Impermissible Abridgement of Civil Rights" to develop a substantive and procedural litigation strategy to assist private individuals and institutions to challenge government illegality in the judicial system.

We believe that only a purposeful strategy and program can in the long run reverse the discrimination that government is forcing upon both the public and private sectors.

Independent regional litigating foundations that we have assisted to get started are in the process of filing *amicus* briefs in the *Cramer* case and in the *Weber* case. **We expect by the middle of next year to define our position in a number of additional** cases involving reverse discrimination any one of which might be heard by the Supreme Court over the next several years. We know that our legal arguments are sound and believe the Supreme Court will follow its dictum in *Griggs v. Duke Power Co.*, 401 U.S. 424, at page 430 (1971) where it stated unequivocally that the Civil

Rights Act of 1964 "...does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

The court further amplified its position at page 436 where it described the legislative intent of the Act, as follows:

"Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant."

SOLUTION

Like any problem that is caused by government intervention the cure can only come from a well-organized effort on several levels to convince the various branches of government to pursue policies more in tune with the majority view of its citizens. Important in this effort is the realization that individual citizens are becoming more aware of the need to correct government abuses. The mobilization of citizen support is important to the success of any specific reform.

The *first* ingredient of any program is a clearly defined and positive alternative program for Affirmative Action in college and university faculty employment. Professor Miro Todorovich, Coordinator of the Committee on Academic Non-discrimination and Integrity, has outlined such a program.

The *second* step it to mobilize opinion on the campuses and to encourage open discussion about current abuses. Most important, concentrate on the positive need for reform along the lines agreed upon. Abraham Lincoln once observed, "With public sentiment, nothing can fail; without public sentiment nothing can succeed."

Third, is to establish legislative and administrative "goals and timetables" and to organize a single purpose lobbying effort to implement that program. The lobbying program should be directed toward legislators and agency administrators and should follow communication themes used in the programs to mobilize public sentiment.

Fourth is to develop a litigation strategy and capability that will insure that the Judicial Branch of government receives the best legal briefs that can be prepared. These briefs must support a policy for Affirmative Action that will discover and reward excellence wherever it is found. There is a positive role underway here through the National Legal Center for the Public Interest. But the basic decision and impetus must come from professional educators and the question to be asked is:

Do you want a university system which gathers together men and women compatible with the statistical objectives of federal bureaucrats or will you put your faith in learning and scholarship?

I hope you choose the latter. The recent record of the academic and intellectual community does not inspire great confidence but it is our best hope for the future. Learned Hand, when opposing maximum quotas at Harvard in 1912 for undergraduate students from Jewish families, expressed his guarded conviction that "...in learning lies the best hope, and that a company of scholars will prove better than any other company."

In closing I would like to end with the next sentence in the quotation from Caspar Weinberger by which I began my presentation:

"If we fail to see this as our real agenda, we risk delivering our destinies over to the cold and lifeless grip of a distant egalitarian government whose sole purpose is to ensure an equally mediocre existence for everyone, achieved at the cost of personal liberty."

Thank you.

Martin H. Gerry

Civil Rights Regulations — Hindsight and Foresight

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Thank you, and good morning. I appreciate the opportunity to be here this morning with you and I want to express my gratitude, before I begin, to the townfathers of Scottsdale who have provided the beautiful locale and the warm and sunny climate for this meeting. I would like to talk this morning about some of my experiences after eight years with HEW and share with you my concerns and analysis of some important problems which face the government, face the colleges and universities and face the people of the United States as educational institutions are regulated by the central government. I have served since mid–1975 as Acting Director and Director in the Office for Civil Rights. During that period, I have corresponded with many of you in this room about important issues related to the current civil rights regulatory process. You have all shared your concerns — never with the ultimate goal of the Civil Rights program but rather with its processes and style of administration and the effect of these processes on colleges and universities. Some of our exchanges have been heated but all have provided counsel and have reflected well the need for open discussion.

Today I would like to discuss the major problems which I see and propose the solutions to them which I would envision. Before doing so, I think it is only fair to disclose some of my biases. First, as the department's chief civil rights enforcement officer and after an active involvment in Civil Rights matters and Civil Rights litigation for over twelve years, as an attorney and a student of American history, I believe that serious issues of racial and sex discrimination continue exist in all major types of institutions within this country. While much progress has been made, I personally reject the notion that any major type of educational, political and social institution is, at this time in our history, free of discrimination or close to it. And that is not intended as an indictment of every institution or the good faith of many or most of the people making decisions within these institutions. But the fact remains, as I see it, and the record in the courts and of the department supports the view, that much remains to be done.

A second bias, an experiential one, derives from my personal history. I grew up around a large private college. While my father was a part-time faculty member as well as a college administrator, talk at the dinner table was, however, usually directed towards the financial rather than the academic problems related to the survival and growth of that university. Having done my graduate and undergraduate work at the same university, my own experience has sensitized me both to some of the enormous problems facing colleges and universities, seeking to exist and retain their individual identities, and of the enormous value to this country of maintaining diverse and independent institutions of higher education. Nothing could be more foreign to my experience and my values than the homogenization of education.

A third and final bias is a philosophical one. It derives from my New England ancestry. My great great grandfather, a marblehead Massachusetts merchant, having signed the Declaration of Independence, and having been active during the Revolutionary War, while serving as a delegate to the Constitutional Convention from Massachussetts, refused to sign the Constitution because he feared the concentration of power in a central government, a situation which he regarded as a clear and present danger to liberty. He feared not the abuses of the federal legislature, but argued forcefully and unsuccessfully at the Constitutional Convention for a limitation on the authority and power of the judicial and executive branches, a power which he believed would lead the country back to tyranny. I believe that each of these three "biases" will reveal itself in my assessment of the current State of the Union, Civil Rights Regulation, 1976.

I have observed that the law-making functions assigned by the Constitution to the Legislative Branch, are being increasingly transferred to the Executive Branch. Congress has, since 1964, devoted less and less attention

to civil rights legislation, and yet has begun to pass new types of civil rights legislation with alarming frequency. The interaction of these two trends is dramatically illustrated by cursory review of the civil rights statutes, administered by HEW with respect to federally funded educational institutions.

In 1964, after ten years of extensive debate with federal courts, a year of active floor debate in both houses of Congress, and approximately 6,000 pages of legislative history, Congress passed the race discrimination prohibitions of Title VI of the Civil Rights Act of 1964.

In 1971 and 1972, with twenty or thirty pages of legislative history, floor debates for a few hours directed towards one or two issues, and a record of very limited judicial attention, Congress passed sweeping sex discrimination provisions in Titles VII and VIII of the Public Health Service Act, and in Title IX of the Education Amendment. Now the implications, I guess, would be obvious to many who are here, and it has been reflected in some other concerns that have been raised, **that question of the "coverage" of Title IX that is, what constitutes "federal financial assistance," and thus which institutions are reached by the statute, was never debated or discussed in either house of Congress.** In this regard the Attorney General of the United States, a person sensitive to the needs of higher education institutions for independence, and certainly not philosophically opposed to interpreting the statute, to permit the maximum flexibility to institutions, has concluded, that based on the legislative history or the absence of it, **there is no alternative but to apply the statute to institutions of higher education receiving any type of federal financial assistance including indirect assistance.** Whether or not one agrees that that ought to be so, the point is that Congress never considered it, never debated it, never thought about it, and yet **created a statute which, I believe, can only be interpreted as being applicable to all institutions.**

In contrast, a *second* important issue which was considered the "coverage" of religious institutions. This issue, along with the question of the applicability of the statute to single-sex undergraduate institutions, was considered by the Congress and provisions made in the legislative history of the statute which directly guided the Executive Branch. The legislative record has supported what I think is a necessary administrative action by HEW to interpret the language of **the statute related to a "religious exemption" as broadly as possible, and thus not to look behind or question in any way, tenets of religious institutions seeking the exemption. This position is clearly consistent with First Amendment guarantees and institutions have simply been requested to identify the provisions of the Regulation which are inconsistent with its religious tenets. What has followed, in fact, has been a relatively automatic exemption process.**

The contrast between the way in which the Congress considered, or didn't consider these issues is fairly important, and its implications as far as HEW, and what HEW can do, are very important. Now outside of religious exemptions, and single-sex undergraduate institutions, and a couple of other issues, no serious consideration was given by the Congress to the practical effects of the statute. What we have now is legislation in retrospect. As the practical implications of the statute become apparent in some areas, Congress decides to amend or eliminate parts of the statute. Now that is not in my judgment the way to pass laws or run a country. You should not pass laws which declare that people have certain rights, and then look at the implications of these provisions and amend them in a piecemeal fashion. It might be a more rational process to consider very carefully the implications of the statute before establishing rights of such critical importance. Such a process would significantly benefit the Executive Branch of government and the people regulated by the statute. The time devoted to Title IX was not the bottom point of Congressional inattention to civil rights legislation by any means. In 1973, Congress passed five lines, in section 504 of the Rehabilitation Act, prohibiting discrimination against physically or mentally handicapped persons, with absolutely no legislative history of floor debate. The provisions were introduced as floor amendments in both houses of Congress. And I doubt whether a majority of the members of either house even knew what they were passing.

In 1975, again without any legislative record or floor debate, Congress passed new age discriminations provisions in the Older Americans Act. Here, however, the Congress in its wisdom, gave clear administrative guidance to the department, by providing in the statute that discrimination against persons on the basis of age was prohibited unless it was reasonable.

As these "sense of the Congress" statutes have replaced the more meaningful law-making activities which surrounded the passage of Title VI, the real law-making requirements, of course, have been shifted to the department. And I think it is very interesting to note, having observed the process fairly actively since about 1966, that after Title VI of the Civil Rights was passed, I do not remember any recipient institutions in the United States saying that they had not heard about it, or they did not know what it was intended to mean, or that schools were to be required to eliminate school segregation. There was not any surprise. There were people opposed to the Act, there were people who fought it in both houses of Congress, but there was a clear public understanding of what it meant and of what it was intended to do. The controversy that has surrounded some of these other provisions and which has never really surrounded Title VI of the Civil Rights Act, I attribute to the fact that there was a sense by the public that the issues had been discussed, had been debated, had been seriously examined both by the courts and then by Congress and resolved. In my view, the attitudes of people

toward laws that they may not like, or towards legislation which if they were voting for or against they would have opposed, is effected greatly by the sense of proper deliberation, the sense that the representatives of the people have really considered the legislation in question. I have not kept count — but it must be several hundred by now — of the members of Congress who have sent letters or have stood up on the floor of the House or the Senate and said, "Well we never intended that," or "When I voted for this, that is not what I meant." And when you look at 17 pages of legislative history, (or 22 if you count the captions and the committee report introductory sections) the fact is, that nobody said what they meant or what they wanted, or discussed or debated it.

Little or no attention has been given to the financial implications of these statutes. Now, the President, by executive order established procedures several years ago which require the Executive Branch to prepare inflationary impact statements assessing the economic implications of all regulations. Interestingly enough, the Congress has never adopted a similar procedure before passing the very laws that create the need for regulations. So, for example, when Section 504 of the Rehabilitation Act of 1973 was passed by floor amendment, there was no discussion or consideration of the cost of modifying existing buildings to eliminate architectural barriers. There was no discussion of the implications in terms of the revenue and cost..

It seems to me that this abdication by the Congress of any sense of responsibility for the effect of legislation, is itself, a serious problem in terms of the separation of powers. **I do not believe that the purpose of the Congress as envivioned by the Constitution was to pass laws containing 'good ideas" before giving careful consideration to their implications.** What we are getting is a legislative scenario which goes something like this: A member stands up on the floor of the House or the Senate and says, "I do not think discrimination against, (you can fill in any group you want), is a good idea." "Right," say the other members. Then a statute is created.

Regulations which should be directed to how the department will administer its responsibility, with minor explication of statutory content, have instead been forced by congressional abdication and due process considerations to become law-making vehicles. As a direct result, the Executive Branch has had to shift much of its efforts from the "execution of law" to its formulation. Congress has produced the final constitutional irony by creating for itself a veto power over regulatory law making.

Having passed, for example, a five-line statute with no legislative history, Congress now requires that after the department writes regulations (which constitute law-making), those regulations must be sent to the Congress before becoming effective so that opportunity may be given to Congress to dissapprove by a two-thirds vote of either house. It seems to me very like the veto power described in the Constitution. But as I recall, the veto power is given the President, not the Congress. Thus, we have seen an almost total reversal of constitutional roles. Very troubling. But it is not just the Congress that has been distorting the role of the Executive Branch of government, and intruding upon it, it is also the courts. That trend is reflected by a brief case study of how one district court became deeply involved in the day to day management of the departments of the Title VI elementary and secondary education compliance program. Let me take a few minutes to just give you a history of what happened there.

On October 19, 1970, NAACP Legal Defense and Education Fund filed a complaint in the case of *Adams vs. Richardson*, alleging a general calculated default by HEW in its enforcement of Title VI. The central allegations of the complaint related to the elementary and secondary education area were (1) the failure of the OCR after the Supreme Court decision, in *Swann vs. Charlotte Mecklenburg*, to renegotiate desegregation plans from 87 school districts which had been approved before the decision and (2) the failure by the Office for Civil Rights to follow-up on 99 school districts which had failed to carry out the provisions of their school desegration plans.

Now, many of the underlying allegations were true. They reflected a time in the management of the department during the Nixon administration when there were serious errors made in carrying out civil rights enforcement in responsibilities. The point, however, is that regardless of the accuracy of some of these allegations, the original pleadings raised no issues at all relating to complaint investigations. There was no mention of complaint investigations. The issue had to do with the standards and procedures for requiring school desegregation plans. In its memorandum opinion of November 16, 1972, District Court, having found the factual account of the situation described in the complaint as true, stated, "The discretion implicitly vested in the departments by the statute exists solely for the purpose of achieving voluntary compliance." The department, the court, held has a "duty, on a case by case basis, to employ the means set forth in the statute to achieve compliance." Now there is nothing wrong with that! And the opinion contains no findings of fact or conclusions of law related to complaints or the complaint investigation process.

The Judge's order of February 16, 1973, in addition to providing time frames and procedures to be used by the department to contact listed schools districts and resolve voluntarily or enforce in each instance, imposes as part of its injunction, extensive reporting requirements with respect to complaints received by the office. These requirements contain reports triggering time frames on complaint investigations and voluntary

negotiation but no injunctive prescription.

On June 13, 1973 the D.C. Circuit of Appeals upheld the February 16 order, but emphasized that in doing so it found primary support for its rejection of the "prosecutorial discretion" defense offered by the Government in the trial court's finding that a systematic failure by HEW to employ the enforcement mechanisms provided by the statute had occurred. The appellate court carefully distinguished this situation from one in which the Justice Department lacked the resources to investigate all possible civil rights violations.

On March 14, 1975, approximately three years after the original order, with no formal hearing having occurred the district court entered a supplement order directing the department to use its enforcement mechanisms, (i.e. limit the period for voluntary negotiation) with repsect to additional school districts of the type covered by the original order. This was the same type of remedy which had been ordered by the court in its original order.

The court also found that in the case of complaint investigations that the department had taken too much time (whatever that means) to negotiate before commencing enforcement action, and directed the department to follow the court's desegregation plan time frames for voluntary negotiation in complaint cases. At this point, the court added an additional requirement which dramatically changed the nature of the relationship between the Judicial and Executive branches.

After a one-sentence finding based on the court's review of the complaint reports that were required to be filed under the court's original order, the court found that "HEW has often delayed too long in ascertaining whether a complaint or other information of racial discrimination constitutes a violation of Title VI" and ordered, as a matter of right, that every Title VI complainant, was entitled to have his or her complaint investigated and a compliant decision made within 90 days of receipt. So in the stroke of a pen, the court took over the administration of a major segment of the civil rights program of the department.

Unlike the earlier situation in which the court found inexplicable action in the face of clear evidence of a probable Title VI violation, here the court committed an unknown percentage of OCR's resources to investigate complaints of racial discrimination in a particular region of the country – the 17 Southern and border states. As a matter of obligation, the court ordered this allocation of resources with no regard to competing priorities and with no evidence that probable violations of Title VI has occurred apart from the existence of the complaint itself. So the court without considering the rights of any of the other groups protected by civil rights statutes, allocated an open ended amount of investigative resources (i.e. those necessary to investigate every complaint within 90 days) without knowing the number of such complaints that were on hand and the percentage of total staff which would be used. Thus, the Judicial Branch takes over the priority and decision-making processes normally reserved for the Congress and the Executive Branch.

During the five years since the filing of the suit, the number of complaints of racial discrimination received by OCR has increased almost four-fold. During the same period, OCR resources were called upon to investigate possible violations of Title VI relating to national origin, minorities as well as violations of the sex discrimination provisions enacted during the same period. In entering its March 14, 1975 order, the court considered neither the resources needed by the Executive Branch to meet this totally open-ended order, nor the interests of other minority and female beneficiaries in any OCR resource allocation decision.

The source crisis created by this intrusion into the priority setting and administrative control of the Executive Branch has been somewhat reduced through a settlement incorporated in a modified order. But the court's lack of interest in these "side-effects" reflects a much more serious problem, a problem related to the way in which the courts have looked at the civil rights laws. The development of the law under the Equal Protection Clause of the Fourteenth Amendment, since the enactment of the Amendment in 1865, has reflected the mixing of rights concepts from the English law court tradition and remedy concepts from the English equity-court tradition. These are two discordant themes which have merged somewhat unnaturally in the development of a judicial approach to the constitutional rights area.

Let me give you an example of what I mean. In the English law courts the concept of a "right", related primarily to property rights contract rights and commercial rights, which were regarded as absolute. If you owned a piece of property, you had a right to prevent people from trespassing upon it. If you had a contract, you had a right created by the contract which you could enforce. The tradition of the English law courts was that rights were enforced through the awarding of damages, i.e. money payments from people who, in fact, violated your rights. Each individual's right was looked at separately, and the remedy for each individual's right was for the most part clear.

English equity courts developed along a completely different tradition. Here, the chancellor, exercising the sovereign's general interest in justice, weighed "the equities" of a given situation rather than simply the rights of a particular party. So that when an individual said that they had been prevented from having a job, or had lost money unjustly, the role of the equity courts was to weigh the competing interests and priorities, to look into the matter and to determine what the effects of a decision would be. There were several familiar legal doctrines that relate to the courts of equity, such as the "clean hands" doctrine, for example, which stated

that if you want the power of the court used to your benefit, then you have to show that you haven't, in fact, materially contributed to the problem yourself. England, of course, has no written Constitution, and no "constitutional law." As a result, when the United States Government was created and structured by a written constitution, new legal concepts had to be developed. There was no quick analogue from England for a constitutional law system. In forming the constitutional law process that surrounded the Equal Protection clause, the courts have often merged elements from the "rights" concept with the remedial elements drawn from the "equity" tradition. The Courts of Chancery had total remedial discretion. They could order people to do things over and above the payment of money damages, and remedies usually involved the issuance of an injunction order, specific performance of a contract, or some other direction by the sovereign to do something.

Some current cases display some of the problems that relate to this mixing. Recently, an employee of a corporation who was entitled to a promotion and had been offered a promotion was subsequently denied the promotion because of the provisions of an Affirmative Action plan ordered by a district court judge who found the employer guilty of discrimination. The non-minority male, denied promotion had never participated in the discrimination. The employer denied the promotion solely on the theory that the promotion had to go to somebody else in order to comply with the court order and a second district court judge concluded that the employee was entitled to money damages. The court reasoned that minority and female employees had been injured because of the discrimination of the employer, not by any discrimination of the non-minority male employee who was in turn unfairly denied a promotion because of the employer's original misconduct. The courts in framing the remedies for individual rights violations often do not look at the implications of the remedies on other people. Rights are treated as absolute, and the remedies as automatic and inflexible.

I am not suggesting that the courts are constantly doing this, but I think it illustrates a deep philosophical confusion in the development of constitutional law in this country. Courts should give some serious thought to the underlying concept of rights and the appropriateness of the use by the courts of broad equitable powers to compel action, to reformulate institutions, to redirect government. The concept of property rights, and money, is a decidedly different scheme for organizing society.

While I believe the resource crisis created by the judicial intrusion into the administration of Executive Branch programs has been somewhat reduced by the recent modification of the order, the modification, itself, raises some new and serious questions about the appropriateness of several quasi-adjudicatory elements that have been superimposed upon the OCR investigatory process. The modified order creates a right on the part of complainants, to be notified when there is about to be an adverse finding by the prosecutor (not by a court). As a result, when OCR conducts an investigation of a complaint and finds no violation, before sending a letter exonerating the recipient, the order requires the complainant be notified and given an opportunity to come forward and produce evidence and to contest the decision. Now that seems fair, in a way, it seems very fair. But what it sounds like is a court. It sounds like the type of due process consideration that you would expect in a court but not one traditionally applicable to an investigative agency or a prosecutor. When you begin to apply these concepts of due process and quasi-judicial elements to the investigation itself, you begin to create quite a different idea of what the investigating agencies or the Executive Branch of the government is supposed to be doing. While I can understand and appreciate why district judges with excessive case loads, working long hours, may want to shift judicial responsibilities into the process of the Executive Branch at the earliest possible level, it is a serious erosion of the proper separation of powers. The Executive Branch is thus pushed to become not only a lawmaker, but a law-adjudicator as well. Its primary function as law administrator or enforcer can only suffer from this double edged intrusion. The erosion of the principle of prosecutorial discretion implicit in his trend is also of concern. When you find evidence of a violation, a prosecutor often looks at the circumstances to determine whether, given the purpose of the statute and the interests of the United States, this is the kind of case that should be prosecuted. In many instances where there may be a violation of a regulation which could be proved, the question should be asked, is it good public policy to proceed at this point on this issue? Prosecutorial discretion allows a check on Congresses that do not care about the provisions that they write and a check on regulations the implications of which have not been thought out, because before a decision to prosecute is made, a prosecutor, or someone in that role, makes a judgment, a common sense judgment, whether this is the kind of thing the agency ought to be prosecuting.

If you have to say yes or no, the prosecutor, the person making the decision, has to get on the record, and say either Yes, it is a violation, or No, it is not. Now again, that sounds fair. But there is a good reason why the Attorney General of the United States has never operated under those rules. There is a good reason why the attorney generals of the states have never operated under those rules. There is a good reason why the District Attorney has never operated under these rules. It is because they compel certain kinds of decision to be made and they eliminate certain common sense checks on the process.

I believe that the increasing congressional abdication of law-making responsibilities and the intrusion by the judiciary into the general administrative functions of the Executive Branch, creates serious problems for those protected by the

statutes and those regulated by them. Litigation itself is expanding at the same rate as the output of the law schools. The desperate need for better dispute resolution mechanism is overlooked. There is no question that the Executive Branch of government, at this point, is seriously departing from the original role envisioned by the Constitution. It would be unfair to conclude, however, without criticizing or at least evaluating the performance of the Executive Branch itself. While the courts and the Congress have made major contributions to the current chaotic state of affairs, that is not to say that there are not internal problems within the Executive Branch.

I will mention at least a few. First, getting to the practical level for a minute, there is a lack of clarity between Affirmative Action and discrimination. There is a major difference, intellectually and operationally, between the two ideas. That distinction is not even remotely apparent from current Department of Labor regulations. It is confused. I am sure both intentionally and unintentionally, depending on who is confusing it. It is causing a serious erosion in terms of the support for non – discrimination. Affirmative Action must be viewed as something apart from non-discrimination, something contracted for by the Federal government. It is appropriate for the government to contract with colleges and universities or other recipients, for certain kinds of "affirmative" actions. It is not necessary to contract for non-discrimination when that has been already prohibited by the statutes, or for paperwork, which seems to be the main thing being contracted for right now.

If we are going to contract for something, we ought to define what it is, distinguish it from non-discrimination, distinguish it from paperwork and statistical analyses, and talk a little bit, at least, about the supply issues involved. I know it is obvious to all of you, that the concentration of the current Affirmative Action regulations on employment distribution renders the program almost meaningless for those concerned about employment opportunity for minority faculty members of colleges and universities. In dealing with availability pools, usually under 2% (sometimes under 1%) the current regulations deal exclusively with distributing very few minority faculty members among a very large number of colleges. If there is going to be any meaningful thrust of Affirmative Action, with respect to minorities in higher education, we have got to talk about the supply of the minority students in graduate education

Now I think the only way to deal with this problem, consistent with the program that was recommended by the Federal Advisory Committee, headed by Dr. Flemming, the President of the University of Michigan, is the development of a program providing federal assistance for fellowship programs, scholarship programs, and support programs, which would be available to the institutions, to increase significantly the supply of individual minorities and women (women are underrepresented in many academic employment areas, although not anywhere near to the same extent overall as minorities available for employment.)

If the supply of people was significantly improved, the distribution issues would thereafter be relatively more important. Right now the distribution issues are important because many colleges and universities, because of federal regulations, are looking for a person in a particular category in order to look good on some mathematical indicator of "Affirmative Action". That is simply not what I have in mind when I talk about equal opportunity.

Overlapping and duplicative administrative efforts have created another serious problem in the Executive Branches. You know it, much better than I do, because we all visit you, the equal pay people, the EEOC, OCR, you have the Buckley amendment people from the Privacy Section of HEW. There are probably, at least a half dozen regulators within HEW itself, who, if they are not officially civil rights regulators, are regulating some aspect bearing on opportunity on campuses. The proliferation of civil rights regulators is staggering. EEOC and OCR, for example, overlap in terms of regulatory employment discrimination, among recipients of Federal financial assistance; Title VII and Title IX and Executive Order 11246, all share common prohibitions. The Equal Pay people, under their statute, are really duplicating efforts of both EEOC and OCR. It is obvious that there is a situation in the Executive Branch where there are so many points of contact and so many players that the only thing that can happen is confusion, both from the standpoint of the people seeking redress and this being regulated. The burdens of this duplication is obvious and direct on colleges and universities. I do not see any offsetting advantages. I have never heard an articulation of a good reason to have this duplication other than a kind of trust issue: I trust us, but I do not trust them – that kind of argument. But outside of that, it does not make any sense. It only confuses the issue. It is partly the fault of the Congress because the Congress keeps creating statutes piecemeal: they pass one act one year, act another year. They set up or in fact, create the reasons for bureaucracy. But it would not be fair to suggest that it is outside the control of the President. The Executive Branch can stop *this* problem. We are talking about the coordination of the Executive Branch. It could be done. It could be done if the government reorganizes.

Similarly, we have the paperwork and the reporting burden issue. I would argue that for the most part the OCR is not the major offender there. HEW sure is. And the biggest problem, it seems to me, is again the lack of any kind of coordination, creating chaos in the reporting process. Now there are reasons for this, again many of them bureaucratic. But there are not any *good* reasons. There are not any explanations or satisfactory explanations for why there could not be a single coordinated reporting procedure.

The next thing is obviously the need for public involvement in the development of regulations, guidelines, and reporting requirements. Secretary Matthews has talked a lot about his and has made some very important changes in the department which I am very proud of. I think in terms of bringing in the public much more to the process of developing regulations and alerting the public even before regulations are issued of the issues involved.

We have to be concerned, however, that while we are involving the public, (which we are already doing, because Congress has not done it,) we do not want to create the excuse of the Congress to avoid public involvement in law making. After all, the Congress is supposed to be representing the public. The danger is that in curing this particular evil we may avoid the only real cure which has to be made by the Congress, itself.

Finally, I think the conflict resolution strategies that we use are out of date; they create adversary situations and press implications. The way in which the government goes about reacting to a complaint itself is a serious problem. I cannot send a letter to a college or university making even a preliminary finding with respect to the compliance of the institution with any of these statutes without immediately creating a public event. And you know, all protestations to the contrary notwithstanding, it is an event and whether I say it, or the president of an institution says it, it becomes characterized as adversarial. Then the lawyers take over, and God knows that is the end of meaningful dialogue for at least some time, because the lawyers then begin posturing around litigation: "You should not say that, because if you say that they may use it against you." I am sure that happens on both sides. Everybody says, "Well, do not disclose that because they might know about. . .", and you get into a process where communication is certainly impeded if not destroyed. This understandable, but somewhat deplorable state of affairs, is created by the type of confrontation mentality which surrounds the process. It is a serious problem in the Executive Branch.

PROPOSED SOLUTION

I have proposed five steps to solve this problem – and I believe that that is probably an overstatement. I think that the five steps, if carried out, could significantly improve the situation; they could not solve all the problems.

While they are not steps which will be easy to attain, I think that if we attain them, we can achieve a balance between the proper interests of the government and those being regulated. I do not think the government ought not to be involved in things regarding civil rights. On the contrary, I think that one of the very legitimate functions of the government is to safeguard the Constitutional rights of its citizens. That is a legitimate role of the central government. In doing this, however, the central government needs to balance the right of unnecessary and overburdensome regulations.

Just to take an example, the *Bakke* case presents a good illustration of how government makes intrusive assumptions about the way in which institutions operate which will in turn lead to educational homogenization. Despite lengthy protestations by the court to the contrary, the *Bakke* decision has come dangerously close to establishing for all colleges and universities, uniform admissions goals. If sustained this decision may well be construed to mean that the only legitimate interest of a college is to admit people who have the highest scores on a particular test, or a particular grade point average. No consideration of community service, no consideration of the interests of the college in diversity or cultural pluralism, or any other objective that the college may have apparently can enter in, regardless of the real variety and range of interests of college admissions programs.

I think that the five steps are: *first* the Congress must make the law thoughtfully and, with due care given both to the substantive impact (what this law is going to mean) of the law and the economic implications (what the cost of compliance will be).

How can this be accomplished? *First* through public pressure on the members of Congress, particularly on members of the House of Representatives because they are elected more often, and perhaps pay a little bit more attention to the current views of the constituents. *Second* by the President, who should seriously consider vetoing legislation when Congress has not really considered it. I think it would be an interesting idea for Presidents to begin to use the veto power where a statute that is nothing more than an expression of some general good will, fails to provide the Executive Branch with what it needs to faithfully execute the law.

Third the courts also should recognize that when considering this type of legislation, there may be situations in which it is clear that the Congress has not "intended" anything in terms of a particular legal question. (I suspect in most cases it is true.) The courts should revert to interpreting the substance of the provisions of the law which arrive in specific disputed settings. The courts work best when they are dealing with real problems presented in specific situations by people who have vested interests in the particular outcome. In the last few years, the courts have moved from this case-in-controversy dispute resolution mode, into general arbiters of how the government ought to be run, or how, in fact, the lives of people ought to be run.

They also ought to refrain from trying to turn the Executive Branch into some miniature judiciary by imposing quasi-judicial types of procedural requirements.

Finally, I think that the Executive Branch must faithfully and effectively execute the laws which are made by the Congress. That would be greatly aided if laws are made by the Congress, and as a result, regulations can become more ministerial than substantive. If the Congress does not

make the law, the department has to get into the substance of the law. Due process concepts of notice do not permit the department to just write some ministerial regulation that restates the law.

You can not charge a person with a violation of a statute, never having told anybody what the statute means. If you consider the criminal law it would be obvious that you can not accuse a person of violating a statute based on very nebulous regulations accompanying a five-line statute. That would be unfair, and in the legal sense, it would deny due process. The point is somebody has to decide what the statute means, and it ought to be the Congress.

Finally, overlapping and duplicative administrative jurisdiction be eliminated through government reorganization.

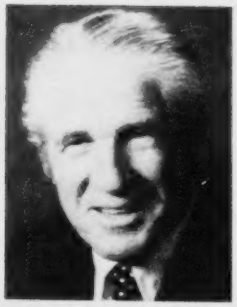
SUMMARY

Congress must make the law thoughtfully and with due care to their implications. *Two*, the courts must revert to interpreting substantive provisions of law which arise in specific dispute resolution settings, and avoid involvement in the day-to-day administration of the Executive Branch. The courts take a new look at the right remedy relationships that I talked about in our effort to clarify the basic legal philosophy underlying civil rights cases and the Equal Protection Clause, itself. Point *three*, the Executive Branch must faithfully and effectively execute the laws. Regulations should be primarily ministerial rather than substantive. *Four*, the Executive Branch must eliminate overlapping and duplicative administrative jurisdictions.

I would propose creating one agency that in fact, would be responsible for the civil rights regulatory role, with respect to higher education institutions, thus eliminating the current five, six or seven agencies, which are dealing with the same issues of similar issues. I also propose that serious consideration be given to combining all of the HEW regulatory functions related to a given type of institution, a single agency which would be a single point of contact for a higher education institution. For each of the three basic functions which HEW performs – regulation, fund distribution, and direct services – I think it makes sense to have different groups of people with different backgrounds and perspective. **But for the regulatory functions which creep into the grant programs and the contract programs as well as civil rights programs, it would make a lot of sense to have a single point of contact and a single voice that could respond with respect to a particular institution on the whole range of regulation affairs.**

Fifth and finally, I think that new conflicts and dispute resolution processes must be developed and utilized. In this regard, I would propose the development of a program which utilizes people from outside of the department who could be called investigating magistrates or arbitrators (using that term very broadly), who would not be stationed in Washington but who would visit college campuses when complaints were filed. These people – let us call them investigative consultants would structure the inquiry, performing somewhat the function of an informal judge and of an investigator trying to bring the parties together. These efforts which would occur not in full public view or with an exchange of correspondence from Washington, but on the campus, in perhaps a majority of all the cases in which we are involved, would result in a voluntary resolution of the dispute fairly early in the process.

The proposals I have made are ambitious and they certainly combine the ideas from many studies and sources; few of them are original. Studies by several people and organizations have already contributed a great deal to understanding better the problems involved. I think these proposals could be implemented if there is an effective advocacy for them by organizations like yours – organizations dedicated to the goals of civil rights as well as to the reform of governmental processes, which may well actually impede their accomplishments.



Hon. George Romney

Preserving the Voluntary Nonprofit Sector

by George Romney

Chairman,
National Center for Voluntary Action

Currently Chairman of the National Center for Voluntary Action in Washington, D.C., Mr. Romney was three times Governor of Michigan, the former Secretary of Housing and Urban Development and a renowned businessman. He served on President Nixon's Cabinet from January 1969 to February 1973. Mr. Romney was the chief executive of American Motors Corporation. Throughout his public and private career, Mr. Romney has been a vigorous exponent and leader of voluntary cooperative efforts for involving private resources in the solution of public problems. He attended Latter-Day Saints Junior College in Salt Lake City and the University of Utah.

Thank you very much. I am deeply grateful for such a generous introduction by Dallin Oaks. I just hope I can partially measure up to it, inasmuch as he's from Brigham Young University.

My favorite family story involves Brigham Young. The first Romney that came to the United States was my great-grandfather. He was born over in Preston, England. Before he came to this country he was a craftsman, a carpenter, and he loved to build fine, beautiful circular stairs. During the Civil War when cotton was shut off from the West, Brigham Young got the idea that he could raise cotton down in the most desolate part of West on the Utah-Nevada border. Brigham Young asked for volunteers. One of these was my great-grandfather. By the time the people emerged from their trials and tribulations and poverty and reached the point where they could build their first major church structure, my great-grandfather was selected to design and build a State Tabernacle. Naturally this building was designed with two secular stairs going up the foyer and into the balcony. While the building was under construction Brigham Young went down to take a look at it. After inspecting inside he said, "Brother Romney, the balcony is too high; it's got to come down." But my great-grandfather said, "Well, Brother Brigham, it can't come down because I've got to have that height for my circular stairs." Now if you want to know what happens when an irresistable force meets an immoveable object, you go visit the State Tabernacle in St. George, Utah. You walk *up* the stairs and *down* into the balcony.

I frequently use this story to illustrate the fact that if you try hard enough, even an irrestible force and an immovable object can find a common area with mutual benefits through cooperation.

Now it just happens that this week I attended three very interesting meetings. I just came from a St. Louis meeting of the National Council on Philanthropy where the dinner speaker was Kingman Brewster, President of Yale University. Among other things, he said there has been a vast growth of power in this country with an excessive concentration in the government area, in the economic area, and that organizations in public and private sectors have become unmanageable. He said that there's a spreading sense of dependence on forces beyond self-restraint or individual influence. On Monday and Tuesday of this week I was at the meeting of the Republican Governors Association. They had a top political analyst, Robert Teetor, as a speaker. He had this to say in analyzing the political situation: There has been a steady decline in citizen involvement in the whole political process, including both parties. He said there was widespread feeling on the part of individuals that they really couldn't influence the situation in any significant way; that the cynicism that has developed has produced a declining participation even in the voting. The percentage of those voting has dropped for 14 consecutive years and there has been a growth in ticket splitting. The people's reliance on special interest groups has grown and people are now thinking of their special interest groups as more effective ad hoc political instruments than the political parties themselves.

At the National Council on Philanthropy meeting, I sat in on the higher education session and one of their speakers was the President of Johns Hopkins University. He said he considered the principal problem of higher education the unstable and relatively high inflation that increases cost faster than income. Actually there has been a decline in the percent of the gross national income supporting the independent or voluntary sector, as was very clearly developed by the research of the "Filer" Commission. Just let me add one additional

dimension with respect to this inflationary picture. I think one of the most sobering facts about the inflation that currently afflicts the free nations of the world is the fact that there is no free nation on earth that has yet adopted the policies that will result in high or full employment without inflation, not one. The Germans have come closest to it, and probably that is because they have had more disastrously sad experience with what inflation can do.

Now I gather from what I have read that your key problem as presidents of independent colleges and universities is government competition – the extent to which the public institutions are getting subsidization that gives them a tuition advantage. Your financial support is declining as a result of not only the total shrinkage but also the competition of the public educational institutions for private contributions. In addition, you are afflicted with the excessive of governmental application of regulations to both public and private institutions.

Another concern is inflation and the fact that certainly the national trend, if it continues, is going to wind up with our facing insolvencies of the type that Britain and New York City have already been confronted with. Now, I think it is time we recognize, and begin to point out forcibly, that representative government is inherently inflationary. I think it, is about time that we recognize this if we are going to deal effectively with our problems, the hard facts are that it is easier for those, who depend upon votes for their political jobs, to tax, and to run deficits, and inflate, than it is to balance the budget. The conventional political wisdom is that that is the safest thing to do.

Now despite the fact that we have a shortage of overall resources, publicly and privately, we are confronted with a growing availability of government funds for voluntary agencies. We are also faced with the fact that there is a spreading willingness on the part of formerly voluntary and independent agencies to accept governmental money. As a matter of fact, there is a growing effort on their part to get government money. Now while this enhances the service capacity of voluntary organizations, I think in too many instances it impairs their independence and thus ignores what I think is their most important function.

In a recent editorial in the *Journal of Current Social Science*, the editor, Paul H. Sherry, made this significant point:

"*The voluntary agencies' role is not primarily to serve as an alternative to government, but instead to help keep government honest and responsible. The primary role of voluntary agencies in American life is to continually shape and reshape the vision of a more just social order; to propose programs which might lead to the manifestation of that vision, to argue for them with other contenders in the public arena, and to press for their adoption and implementation.*"

At our peril we will ignore the need for independent voluntary associations that perform this role of advocacy and monitoring and criticism and challenge. The growing governmental subsidization is particularly serious, because as a rule the government money comes from a government agency in the same field of activity the voluntary service agency is involved in. Thus, it reduces the likelihood of the type of monitoring they need.

We should recognize that we now have two types of voluntary organizations. We have quasi-governmental voluntary organizations, and we have genuine, independent voluntary organizations. And I believe that if those that are effectively independent are going to successfully meet their financial needs, it will be important to develop this distinction in the minds of those responsible for private sources of funding.

Now I think it's important to develop this distinction because, when serious showdowns arise, I don't believe that many of the subsidized organizations will, or can be depended upon to be thoroughly objective in their advocacy, monitoring or criticism. I don't think that those receiving favors in City Hall are likely to be very critical of City Hall in a real showdown. And I believe Brian O'Connell, the Executive Director of The National Association of Mental Health, made a very timely and key observation in his recent article in *Foundation News* entitled, "Voluntary Agencies Must Ask, 'What Price Independence?'" He wrote, "The solution to our problem will encourage the independent voice of volunteerism – it is its independent voice in public matters that is the quintessential value. Anything that compromises the voluntary sectors' capacity to be independent diminishes the function for which society most depends upon it."

Now there are those who predict that for the following reasons we're going to see a tremendous increase in this infusion of governmental money into the whole voluntary and independent sector: (1) inflation (2) the declining availability of private financial support for voluntary agencies, (3) the obvious high costs, ineffectiveness, and, in many cases, the failure of governmental service programs. We're likely to see more and more money funneled into the voluntary organizations as the limitations of governmental resources and the greater efficiency and effectiveness in providing human social service through voluntary means becomes more apparent.

This makes it more urgent to awaken citizens to the vital role performed by independent organizations. This urgency is increased as the number of citizens receiving government assistance and direct handouts swell. I tried to understand what you're confronted with and what we're confronted with in our nation; I became convinced there is a basic interrelationship between your problems and reversing present destructive, national trends. Both of them require recognition of the distinction between the quasi-governmental organizations that have compromised their independence, and those like yourselves, that have preserved this precious and vital capacity. Establishing this distinction

is vital because it opens the likeliest way to secure the financial support required to sustain independent voluntary organizations.

One of the principal findings of the Commission on Private Philanthropy and Public Need was that even if the government should authorize families with incomes of up to $15,000 to double their charitable deduction from gross income to increase their incentive to give, and even if those with incomes of up to $30,000 could deduct 1½ times their contributions, this wouldn't really add a great deal to the amount of money that would be available in the form of private contributions.

The biggest, single source of increased financial support for this whole voluntary sector is from business. The authority that business institutions already have to deduct 5% of profits before taxes and make that available in the form of contributions to non-profit organizations, will produce many times the amount that would result from Congress' adopting the above tax proposals of the "Filer" Commission. They are not likely to be adopted anyway because of the government's great difficulty in meeting its financial needs now because of the current operating deficits.

Developing the distinction between the quasi-voluntary and genuinely voluntary organizations and the importance of the independence of the genuinely independent voluntary organizations, in my opinion, can become a very important aspect of encouraging the business community to make larger contributions to the genuinely independent voluntary efforts. As you know, at the present time business as a whole is using less than 1% of their allowable 5% authorization. That resulted in President Johnson saying to a group of businessmen a few years ago that they must think that government can spend their money better than they can, or otherwise they'd use that 5%. There are only about 15 major companies in this country that use that full 5% authorization, and 12 of them are located in the Twin Cities in Minnesota. So there is a tremendous possibility of increasing financial support from that source.

I believe the profit sector has a community of interest with the non-profit sector, and particularly the independent portion. It has similar problems. The profit sector of this country is confronted with public misconceptions that are comparable to the public lack of appreciation of the importance of the independent voluntary sector. There are misconceptions with respect to its profits. As a matter of fact, I don't believe that most college students in this country – and I don't think that many men in business itself – really have a true understanding of the basic principles on which our economy is based. I think the quickest way to illustrate that is this: we have made the colossal mistake of playing into our enemies' hands by labeling our economic system as being fundamentally a capitalistic system.

Now it *is* capitalistic. It *is* based on private ownership. But that is *not* its *dominant* characteristic. Its *dominant* characteristic is that when we took off economically in this nation, we did essentially the same thing economically that we did earlier politically. We vested ultimate economic power in the people. We had earlier vested ultimate political power in the people, through the ballot box, and we vested ultimate economic power in the people as consumers when we adopted the principle of competition in the anti-trust laws. This put the people in the position to make the ultimate economic decisions. Now we've compromised that a good deal. There isn't time to get into the extent to which we've compromised it.

The exercise of ultimate economic power by the people as consumers is not theory with me. As I faced the problem of helping to save the last independent automobile company, we had a lot of problems. We were paying higher wages and fringe benefits than the big three, and we had other problems. But the major problem we had to deal with was to get more people to buy our cars and to convince them that our cars were worth buying.

If you want to read a book that develops this aspect of the American economy better than any book I've ever read, it's *The Image of America*, written by Father R. L. Brookburger, the French Dominican priest-historian who came to this country following World War II. He spent eight years here in all parts of the country. In his book he points out the nature of the American society both politically and economically. In that book he talks about an American economist by the name of Carey, who really identified the basic American economic concepts better than any other economist. But he's practically unknown.

In any event, the profit sector of this country is confronted with the same types of misconceptions and misunderstandings that afflict the independent voluntary sector. And they're also burdened with the excessive regulation that you're so troubled with. As we face the prospect of continuing inflation and possible insolvency, they're confronted with more and more regulation and the possibility of excessive regulation to the point at which we actually lose an independent competitive economic system in this country. When wage and price controls are adopted, as a recent President did in desperation, then you eliminate a competitive enterprise economy. Then the government, not the people, makes the ultimate economic decisions.

My basic point is that the profit sector should not only be increasing its financial contributions to the non-profit sector in total, but focusing them in support of the remaining independent voluntary organizations. I'm convinced that's a salable proposition in this country to business organizations.

There's a close interrelationship between independent colleges and universities and the profit sector. And this was partially developed in a talk

you had heard a year ago by R. H. Coase, the economist from the University of Chicago. At your meeting a year ago in a talk entitled "The Market for Goods and the Market for Ideas," he said, among other things: "I do not believe that this distinction between the market for goods and the market for ideas is valid. There's no fundamental difference between these two markets. And in deciding on public policy with regard to them, we need to take into account the same considerations."

I read in the *New York Times* yesterday an article that I think had great significance. This article is based on an interview that Anthony Lewis had with a man who's destined to play a significant role in the Carter administration, and who did play a significant role in the Johnson administration. He was director of the budget with L. B. J. and had an intimate part in the development of all the "Great Society" programs. I refer to Charles Schultz of the Brookings Institute. And here's what Charles Schultz had to say to Anthony Lewis:

"As you look down the road of growth and affluence, you just know you'll have to have more social influence on choices. The dilemma is that the way government usually attempts to influence society is so often ineffectual. That way is regulation – making rules and telling a sector of the economy to obey them. In the last twenty years the rules have multiplied"

There are 77 regulatory bodies now, Mr. Schultz estimates, 50 of them created since 1960. The rules can be absurdly rigid and trivial. "The Occupational Safety and Health Administration," said Mr. Schultz, "has 21 pages of rules on ladders, including this statement, 'When ascending, or descending, the user should face the ladder.'" Now Schultz's solution is to rely more on giving the private sector incentives to act for social ends and less on what he calls the "command and control techniques of government bureaucracy." He would apply to public matters what we seldom do now: the American belief in Adam Smith's invisible hand – the market.

One market device proposed by Mr. Schultz is a stiff tax on each planet that puts polluting sulfur oxides into the air. He would use the market mechanism even in such areas as health and man-power training. Well, the one encouraging point is, here's a man who helped to bring onto our society an overwhelming complexity of regulation who now recognizes that that isn't an effective approach and that there is a need to begin to use the market mechanism, and to rely on incentives instead of regulations.

The health of non-profit independent organizations is linked to the health of the profit sector and I believe the reverse is true. Furthermore, I ardently believe the health of both is linked to preserving an America where the people, not the government, are sovereign. Only an America where the people are sovereign, can make additional progress in reducing the ills of citizens and excel in unleashing the God-given, creative talents of individuals to contribute further to national progress. But the preservation of the people's sovereignty and the independence of their voluntary organizations will require change in the nation's present basic trends and require the adoption of some very basic reforms. Basic reforms solve such problems as inflation and the deterioration of our cities. Reforms as basic as those were adopted to resolve the two worst disasters we have faced as a nation.

There have only been two disasters that really involved the survival of the nation since the Constitutional Convention. One was the Civil War and the other was the Great Depression. We adopted major reforms as the result of both of those great disasters. Now we must change our present direction by adopting reforms as fundamental as those that were involved in those two crises, if we are to avoid another disaster that will jeopardize our survival as a free society.

Unfortunately, we have not been able to adopt basic reforms of the magnitude now required without a disaster. The principal lesson I've learned from my involvement in all major sectors of American life – I have been involved in the economic sector; I've been involved in the governmental sector; and I've been involved in the voluntary non-profit sector – is that we are unable to achieve basic reforms we need without a crisis or disaster. And I've checked this analysis with Presidents and presidential candidates. They all agreed with it.

Now why is this? Well, I think it's because we have never developed the means of doing what Jefferson said we had to do if we were going to keep a society where the people would exercise ultimate power. Jefferson said:

"The only safe depository of the ultimate power of society is the people themselves, and if we consider them not sufficiently enlightened to exercise that power with due discretion, the answer is not to take it from them, but to enlighten them."

In my opinion, we have not developed in our free society – nor has any other free society developed – the means, on a nation-wide basis, by which there can be the public understanding in time to avoid the necessity of paying the price for letting events create such public misunderstanding. Now we have done it at times on a local basis, and we've done it at times on a state-wide basis. But we haven't done it on a national basis.

Now, why is this? Well, the Founders thought that if they provided for universal education that that would create an enlightened citizenry. Certainly that is fundamental to having an enlightened citizenry. No doubt you are familiar with Lord Macauley's statement that the great weakness in the American society was that our Constitution was "all sail and no anchor." Macauley predicted we would generate our own huns and vandals who would destroy us from within. When you consider the psychology of entitlement that has

developed in this country entitlement without regard to contribution – there is reason to be concerned as to whether Macauley was right or whether Garfield was right. President Garfield said that Macauley was wrong because through education, we would have an enlightened electorate and this enlightened electorate would not commit political suicide. Now the hard facts are, regarding our most basic problems, that our educational system has not provided an enlightened electorate that understands our economic system, or basic problems, like inflation, the city crisis, and what needs to be done about them.

In this connection we have also expected too much from the political process. I think people have thought that the parties, campaigns, and the candidates would create public understanding of our most basic problems to enable them to be solved before a crisis or disaster developed. I have concluded, as a result of my experience, that this is a mistaken viewpoint; the basic reason being that the success of the parties and the candidates is not dependent on their helping people to understand current, basic, vital, controversial issues. The basic function of the parties is to select candidates who then compete for the responsibility to govern. That is a tremendously important responsibility. But the candidates then compete, and the one who gets the most votes wins. And to get the most votes they stay away from the vital, controversial issues, because if they discuss those vital, controversial issues that people do not yet understand, they will lose. They don't win. And so they avoid them or finesse them. They don't discuss them in depth. They don't offer specific solutions. Look, Reagan said, "I am going to cut the federal expenditures by 90 billion dollars. I am going to let the states and local units have more tax-raising elbow room."

"Be specific," the media and opponents demanded.

He backed off. He lost New Hampshire because of that; because in New Hampshire they are allergic to a state income tax, and they knew if he did that, they would have to have a state income tax.

Carter said, "I am going to consolidate the sprawling federal agencies."

"How?"

His reply, "I will tell you a year after I am elected."

They finessed the problems.

Walter Lippman put my point very succinctly. He said, "You can't be right too soon and win elections." It is that simple. And being right too soon is being right on a basic fundamental issue that people don't yet understand.

Now we also rely excessively on the President. I have seen the limitations of presidential power. I have seen the extent to which a president is influenced by his desire to be re-elected. One basic reform we need is to limit a President to a single term of six years. I would also limit the members of Congress to two terms in the Senate and three or four year terms in the House.

Nixon made inflation his number one domestic priority when he took office, but he didn't deal with it correctly or adequately. The reason was not because he didn't understand the two basic aspects that had to be dealt with, both demand-pull and cost-push inflation. He dealt with demand-pull. He refused to do anything about cost-push (the wage-price spiral) even though some of us were urging him from the start and insisting he had to eliminate that too. The reason he didn't was because he said there was not the public understanding to succeed in doing anything about the wage-cost price spiral resulting from the massive concentration of economic power on the price side and the wage side and the power of business and unions to push up wages and costs and prices without reference to productivity. And so while he curbed demand-pull, he didn't act on cost-push until the summer of 1971. Then he had to go to all-out controls, and that didn't work well either. His failure confronted us with inflation in the midst of high unemployment, or "stagflation."

It is a mistaken idea to think we are going to elect somebody President and have him deal effectively with such problems without an enlightened electorate or a disaster. It is not going to happen for this reason: the dominant political influence nationally in this country is the triple alliance between the special interests, the bureaucracies that have been created as the result of subsidy programs or special interest programs of one type or another that have been secured by these special interests, and the Congress. And that alliance between the special interests and the bureaucrats and the Congress is the thing that makes it popular to talk politically about big government, both liberal and conservative, as politicians are doing now because the people are concerned about it now. But the minute they become specific, the people benefiting from particular programs say "Oh Yeah, we want you to cut back on big government and spending, but we didn't think you were going to touch our program!" And that is what prevents it. And I want to say too, that we will not see a reversal of basic trends in this country until there is sufficient public support and understanding to overcome this resistance on the part of this alliance of the special interests, the bureaucrats and the Congress. For a reversal we must have an enlightened electorate or a disaster. Can we adopt a process that will enlighten the electorate before disaster? That is the vital question.

I resigned from the Nixon administration because I was primarily responsible for solving problems that could not be solved without basic reforms. Neither the President or Congress were prepared to support needed reforms because of inadequate public understanding. There is no part of the American economy more affected by inflation than housing. And neither the President nor the Congress were well-prepared to deal with inflation, in an adequate way. And the other problem I had was the problem of the cities and they were not prepared to become involved in the tension between the central cities and the suburbs and the underneath race relationship problem in an

adequate way. So I was stymied. I resigned because I was convinced that in order to overcome the reluctance to deal with those fundamental problems, and some others through adequate reforms, that we would have to have greater public understanding. I wanted to do something about that.

To develop such an understanding we need to organize the concerned citizens in this country and enable them to identify the problems they think will make us or break us as a society, and, identify the facts they agree are relevant facts, and the solutions they agree are necessary, and then seek their adoption.

I left the administration to bring about such an organization of citizens. I have not yet succeeded. To initiate such an organization successfully, I have tried to bring together a representative group of national leaders who would be capable of commanding the respect and participation of enough citizens to make the effort successful. But I came up against two basic reservations. One was their doubt that it could succeed on a national basis even though it has been done successfully many times on a state or local basis.

I got into public life basically as the result of the creation of an enlightened electorate in dealing with Detroit's school problems back in the 1950's. Later Michigan found itself in great difficulty with a dead-lock between a Republican legislature that was excessively dominated by the large corporations together with the county courthouse officials, and a Democratic Governor, "Soapy" Williams, who was excessively influenced by the unions. As a result, we had payless pay days and they concocted a new drink in the Midwest called "Michigan on the Rocks." At that time we organized Citizens for Michigan. A cross-section of state leadership decided it was time to mobilize the state's concerned citizens. Only responsibility to our Creator and our family is superior to the responsibility of citizenship. It is above the level of partisanship or economic interest.

We only had five thousand citizens, out of 8 1/2 million in the state join in the effort. However, they identified the problems that needed solutions, documented pertinent facts, agreed upon solutions and we turned the state around. That is what got me involved in the political process. But I repeat, as I undertook to bring a leadership group together nationally, they kept saying to me, "Well, yeah, you do this in a city; you can do this in a state, perhaps, but it is too big to do nationally."

Now that was one reservation. The other was, "Well, isn't that what John Gardner's doing?" Now those are the two things that stymied me. The first one I can now answer more positively. The National Center for Voluntary Action, of which I am chairman, considering what it might do in the Bicentennial year, decided that because Paul Revere had not been paid to make that ride and the boys that shot from behind the hedges and under the bridges had not been paid to do the shooting, and because our nation was uniquely distinctive in its degree of voluteerism and our helping each other, that we ought to afford an opportunity for the volunteers of this nation themselves to voice themselves with respect to what ought to be done to strengthen volunteering. So, with only months to go, we decided to organize a national Bicentennial Congress on Volunteerism and Citizenship. And let me quickly sketch what that involved.

We invited citizens to convene in local forums, as long as they permitted any citizen to participate on a citizenship basis, and to identify what they thought the problems were in the area of volunteerism. What are the problems we ought to deal with? What are the facts? What are the solutions? Those participating in local forums were encouraged to join together in convening a forum in each federal Congressional district for the same purpose, and also to elect a delegate and an alternate to a national Congress.

Now the national Congress just took place November 19 23 in Washington, D.C. There were delegates from 36 states — all the way from Alaska to Florida, from California to New Hampshire. Based on the report sent in earlier from the local and Congressional districts forums, six major problem areas were of most concern. Precision papers were developed on these problems with the best talent available. Resource advisors assisted the delegates during their consideration of these problems at the national Congress. The delegates selected the problem committee they wanted to be on. The committees considered these problem areas and developed recommendations to deal with them. Delegates then met in state caucuses and considered the proposed recommendations, debated them and then balloted on them. Those recommendations receiving a two-thirds vote in the consolidation of the states' balloting were considered adopted. Those that fell short of a two-thirds vote were submitted to a plenary session in the order of the vote received. Those receiving a two-thirds vote then were considered adopted. This Congress proved that you can organize a citizen effort, a grass-roots citizen effort, on a national basis and enable people to come to grips with what they consider the basic problems. The process for doing it successfully has been demonstrated.

Now, for years I have seen elite groups in this country identify what they thought ought to be done about basic problems and then try to get broad based public support. It doesn't work from the top down. It must involve a core of concerned citizens. It doesn't take too many. If three hundred thousand citizens in this nation took the time to participate in the process I have outlined, they could then become the catalytic means, through their actions, to implement their recommendations and the coverage of their actions by the needed media would create the needed public understanding, just as it did in Michigan, on a lesser scale. I secured reforms as Governor in Michigan that had defeated governor after governor in this country and, following those reforms, I received the biggest

plurality in the history of the State of Michigan. The state income tax was dubbed the "Romney income tax" but, unlike the fate of the other Governors responsible for a state income tax, was not defeated. So this is not just a theory that I am talking about.

John Gardner and I have had many discussions. I joined his Common Cause when it was organized and I hoped he was going to do what I have been talking about, but he didn't. It fell short for these reasons: (1) He did not involve the citizens supporting him in identifying the problems to be dealt with and then engaging in the discussion and dialogue necessary to develop understanding of the facts, to reduce prejudices, and to enable them to reach agreement on what ought to be done, so they could become a catalytic force in the country, and create broad public understanding. Instead of that, he rushed off in a lot of directions that he personally was concerned about. He did mail out lists of problems for citizens on a priority basis, just as a pollster check does. But that does not create a better understanding of these problems or identify areas of agreement about facts and solutions. Another thing he failed to do was to identify the vital problems that are going to make us or break us. John Gardner has been saying for years that the principal problem is that we are not spending enough money to solve our problems. He came to governors' conferences and made this point. Thus, he sought to change the processes of Congress. He also had some impact on campaign financing. But I submit that that is like undertaking to improve the way in which the computer operates when the real problem is what is being fed into that computer. The real problem in this nation is we do not have the public understanding to enable those who have the responsibility to bring about the reforms we need, to bring them about. And if you have that public understanding, then the political parties and the candidates can and must deal with those problems.

In Michigan, constitutional convention and a state income tax were too controversial for candidates to take specific positions on before 1962. But, as a result of the effort of 5,000 citizens in Citizens for Michigan, together with the 5,000 members of the League of Women Voters, plus the media coverage our efforts generated, you could not run successfully for public office in 1962 on a statewide basis without taking a specific position on those two issues. The same thing can be done nationally.

The reason I point this out is this. I think the timing is right and I think your independent colleges and universities have a range of contact with your alumni who, if joined with those in some other independent voluntary groups in this country, would bring together enough citizens to identify the problems that are going to make us or break us, and the relevant facts and effective solutions and secure their adoption. In the school study I was involved in, we made 182 recommendations we agreed on, all of which were adopted, some of which had been voted down 3 and 4 to 1 for years. I believe the process can succeed nationally. I believe a coalition of representative citizen leaders and independent organizations should invite citizens generally to participate in a citizen-controlled effort to turn this nation around and create an environment which would be healthier for your independent private colleges. Thank you very much.

Dr. Dallin H. Oaks

Legal and Legislation Problems in Higher Education

by Dallin H. Oaks
President of AAPICU
and President, Brigham Young University

Hal Visick, Esq.
General Counsel
Brigham Young University

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Dallin H. Oaks took office as President of Brigham Young University in 1971. He graduated from BYU and from the University of Chicago Law School. After practicing law for three years specializing in corporate litigation, he became an Associate Professor of Law and in 1964, a Professor of Law at the University of Chicago. The President of AAPICU, Dr. Oaks has represented our Association on various legislative issues in Washington.

Oaks: First presentation and the heaviest one will be by my colleague, Hal Visick, General Counsel of Brigham Young University. Mr. Theberge and I are just here to provide weight on either side of Visick who is the real authority and presenter in this panel.

TAX REFORM ACT

Visick: I have been rather heavily involved in the lobbying efforts to head off several tax reform proposals which fortunately did not make it into the final bill passed by Congress last August. Tax reform and tax legislation have been an important aspect of what I have been working on for some time. I thought you might be interested in the Tax Reform Act of 1976 insofar as it may apply to colleges and universities. I am happy to say that very little of the act does apply and, therefore, with respect to donations and other sensitive areas, we should be able to go along pretty much as we have in the past.

There have been no serious changes in the law which would affect our ability to raise funds. Some changes have some remote possible influence on charitable giving. Among these are the changes in the minimum tax rate are provisions which now includes the charitable deduction as an item of tax preference. This provision could affect the very large donor with a very large taxable income. Most of our large donors do not have large taxable incomes. But, those who do may be inhibited by the minimum tax provisions. Most donors, by splitting donations, could still avoid that problem.

There is also a change in the 50% bracket which has been expanded to include pensions, annuities and deferred income. Again, I think it will not have any great effect on donors who may have retired and have pensions and annuities. While it is true they will be able to shelter more of their income they, therefore, have less inclination to make gifts of such income. The motives for donations are not so finely drawn that the minor tax variations would eliminate the gift.

With respect to private foundations — from which many of us receive substantial gifts — the mandatory payout provisions for private foundations were revised from a variable percentage of the fair market value of their assets to 5% of fair market value. This probably will make it easier for us to receive continuing support from such foundations since the private foundations will not have to be concerned about future variations in rates.

Now, there is a minor change in taxation of contributions of inventory. As you probably know, when a business contributes inventory items, it may claim only the lower of cost or market value. This means that if the property has appreciated greatly in value, the donor would get a deduction only for the original cost. As a result, contributions of inventory have almost disappeared. For example, if a dealer wanted to give your institution a car, the car dealer could only take his cost and not the retail value. A minor change has been made in the case of those of you who operate programs on the campus (such as hospitals) which care for sick, the needy or infants. The contributor of inventory items can take a deduction of basis plus one-half appreciation up to double the basis. If you do have such an operation it may be possible to go to business and ask for donations of inventory items under that provision.

The final and ultimate and last chance to amend Charitable Remainder Trusts under the Tax Reform Act of 1969 has been extended to December 31, 1977. It has been extended about 12 times and this is supposed to be the ultimate, final and last chance. If you have any such trusts or if you are aware of a donor's will creating such a trust, and it is not amended by then, the trust will retroactivley lose its deductible status. I think almost all colleges have already taken steps to amend all such trusts.

The rate of tax for gifts, non-charitable gifts and for estates has been made uniform. That is, gifts

during life cost the donor the same tax rate as if he had left property in his will. In the past gift tax rates were three-fourths the rate applying to gifts by will. Under the general theory that raising taxes encourages charitable contributions, this may tend to increase the incentive for charitable giving. The rate goes to 70% for estates exceeding ten million and continues at that rate thereafter. The raising of the gift tax rate probably would increase interest in creating some sort of memorial gift to charity with property which would otherwise go primarily to taxes.

There is also now included in the estate and gift tax, a tax on appreciated property at death. It used to be that you could give your property to your family by will and they would obtain a so-called stepped-up basis. That is, the basis of property in the hands of your heirs would be its value on the day of your death, rather than what you paid for it. Under the old law, a piece of property for which you paid $10,000 which was worth $100,000 on the date the owner died, could be sold by the heirs for $100,000 (no capital gains tax.). Basis is now carried through, the heirs will have the same basis as the decadent had. During the transitional period the basis of property in the hands of the persons who inherit it will be its value on January 1, 1977 or cost, whichever is higher. And so, after the transition period it will no longer be possible to get a stepped-up basis. The effect of this change will be to raise taxes. This could provide an additional incentive for charitable giving.

LOBBYING

Lobbying activities of charities are covered in the new Tax Reform Act. Present law prohibits charities from devoting a "substantial" part of their resources or activities to lobbying. Charities have been fearful of any activity which could be thought of as lobbying, including contacting alumni to ask them to vote for bills in which they are interested. The new law provides that lobbying expenditures not exceeding 20% of the first $500,000 of annual donations received would not be considered excessive lobbying, above $500,000 a sliding scale applies. I doubt that any of us has ever come close to any of these figures and I think we can feel fairly safe about our lobbying activities.

Question: Is the law clear on what constitutes lobbying?

Visick: Not really. There is a provision that deals with so-called grass-roots lobbying. You are not supposed to expend more than 25% of your lobbying budget for grass-roots lobbying. That would be going out to educate the public as opposed to having an association in Washington. I suppose all of our contributions to the Washington-based* education associations would be thought of to some extent as lobbying.

UNRELATED BUSINESS INCOME

Most colleges and universities have a problem trying to decide which of their activities generating income, such as bookstores, printing services, and so on, could constitute unrelated business income, which is taxable. Some additional certainty has been added by the new act in some areas. Two sections deal with this. (1) If you buy property or receive property by gift, which has a tax lien on it, the sale of that property would not cause you to have unrelated trade or business income, despite the fact that sales or property acquired with indebtedness usually do generate unrelated business income. This just clarifies what we had hoped would be the case, that is, tax liens are not "acquisition indebtedness" for that purpose.

(2) Some institutions have adopted the practice of giving options on stock held in their endowment funds. If those options are not exercised, there was a question raised as to whether the income was taxable. Income from sale of stocks is generally thought of as "passive" income, and is not taxable to charities. But when the stock is not sold, the question is raised as to what is the nature of the income resulting from the sale of the unexercised option. The new law says that income from unexercised stock options is not unrelated business income and is not taxable.

I don't imagine this affects many of us here, but it does affect a few colleges. If you have employees stationed overseas, the tax provision are unchanged with respect to employees of charities. The amount of excluded income which was formerly $25,000 for overseas employees of U.S. corporations other than charities is now reduced to $10,000.

Many professors have been in the habit of deducting part of the cost of offices in their homes which they used for lesson preparation and research. Now the law has been changed. The average professor would not take any deduction under the current law because it requires that a specific part of your house be set aside as your main working place and that it be so regarded by both the employee and the employer.

I have never been troubled by this next one, but perhaps some of you will be. In traveling to attend foreign seminars and conventions, outside the United States, you may deduct the cost of only two such trips in a given year.

SOCIAL SECURITY COVERAGE

As you may know, charities and their employees generally are exempt from social security coverage unless they waive the right to be exempt; in other words, unless they choose to be covered by social security. Many of us have been witholding and paying-over social security without ever formally contacting the service and saying we waive our rights not to be covered by social security. The new law provides that withholding and paying-over the tax for three consecutive quarters in any given year will constitute an automatic waiver.

LOANS UNDER GOVERNMENT PROGRAMS

There has been a long-standing problem as to how to treat loans under programs of state and federal governments, whereby a portion of the loan would be forgiven if the students complies with certain requirements, such as teaching or practicing rural medicine. The IRS wants to treat this forgiveness as income. Obviously the recipients did not want to treat this as

income. The new law provides past forgiveness of indebtedness will not be income, but after January 1, 1979 it will be treated as income.

OTHER LEGISLATION ITEMS

A couple of other legislative items may be of interest to you. There is the copyright revision law. Our principle interest will be in the statute's definition of "fair use" which deals with the question of whether copies may be made of printed materials without infringing a copyright. I don't propose to give you a complete summary. I just want to make you aware that there is such a provision that provides rather explicitly for how many copies of different types of materials may be made. If you are concerned about this problem, I suggest you obtain a copy of the *Chronicle of Higher Education* for 1976.

The law has been amended to clearly include the privilege of mailing college catalogs and bulletins by second class mail. This was a law which was supported by colleges and universities because the Post Office after 50 years of accepting them, suddenly decided that these items were no longer proper second class mail.

TUITION REMISSION PROGRAMS

Let me just summarize the tuition remission situation and what we are attempting to do about it. In the last two years or so, the Internal Revenue Service in the northeastern part of the U.S. has been questioning tuition remission programs. These are programs under which colleges remit all or part of the tuition charge for faculty members and their children. In some cases, the colleges have been paying the full tuition at other institutions for faculty children on an exchange basis. If this were a case of first impression, I think you would probably have to say this is not the usual tax-free scholarship and the benefit would probably be taxable.

These benefits have been considered nontaxable by the IRS for more than 20 years. After this long history, the Internal Revenue Service has suddenly started taking the position that these payments are now taxable to the employees and that the colleges and universities should have been withholding social security payments. There is a general principle of law that long-standing interpretations which have not been revised by changes in the statutes are generally thought to be correct. Administrators may not normally come along 20 or 25 years later and adopt a contrary interpretation. That is particularly true where Congress has had an opportunity to consider these payments in the past, in fact has considered them, and has not changed the law. Probably the strongest, or at least to me the most persuasive, argument that these payments are not taxable, is the fact that they have not been taxed in the past and that this has been accepted by those who make the law as a correct interpretation of the law. (Note: The Internal Revenue Service has withdrawn its proposal to tax these payments.)

EQUALIZED PENSION PAYMENTS

Let's look at some other things that you may be interested in. There is quite a bit of litigation going on the equalized pension payment problem. This litigation stems from the women's liberation movement and others, that women should not be paid lower pensions than men. Most present pensions are based on the anticipated life of the recipient and the amount of money available to pay pensions. It is a well-documented fact that women outlive men by some five to seven years on the average. So, if you have a pool of say $200,000 to pay the pension of an individual, a woman would ordinarily get a lower pension but for a longer period than a man. There has been quite a bit of litigation over this. The women's movement claim this is discrimination because women and men do not get identical pension payments.

How can we fund so that men and women get payments of the same size? I have thought of several solutions. One would be to have automatic execution of anyone surviving past the final pension payment. Another would be to have women wait till age 72 before retiring.

Something of that sort... but obviously if this is going to be done, we must change the way we compute pensions. Pensions will be paid into a pool which will be worked out so that everyone gets equal payments and there will be money available to pay over the longer life spans of women.

Question: What is the status of this issue now?

Visick: Well, the Department of Labor regulations currently provide that you can either make equal payments or equal contributions. Most of us are making equal contributions at the present. The Equal Employment Opportunity Commission Council has tried to persuade the department that equal pension payments should be required and that a unified table should be worked out regardless of sex.

There have been several cases which have gone in both directions. Most are on appeal now. None has reached the Supreme Court. I am not sure that any has actually been decided by a circuit court yet, but they are now ripe for decision by circuit courts. The Equal Pay Act requires one thing and the guidelines and so on, the non-discrimination provisions, require another. Under the Equal Pay Act you must pay everybody the same salaries for the same work, and that includes fringe benefits. That presumably means that you must make equal contributions. Under Title IX and Title VII you must treat everyone equally regardless of sex.

It seems to me that a good argument can be made that having different pensions is not discrimination because it is based upon provable facts. Ordinarily, distinctions based on facts would not be thought of as discrimination. Discrimination ordinarily refers to making decision based on prejudice. I think that the women's rights movement may prevail in this eventually, unless there are some rather courageous court justices. If not, men's pensions will be reduced.

If the law is changed, as it probably will be, equal pension payments could be retained. The insurance companies don't really care about this as long as their experience pool is somewhat consistent with the amount that they must pay out. If they develop unified tables for both sexes they will come

out all right. It doesn't really make that much difference to them. It is really a question of fairness.

Question: What about those already retired?

Visick: I don't think there would be any effect whatever. This will undoubtedly be prospective in nature, although you can foresee the possibility of a bunch of lawsuits by the women who are now retired. Interesting sidelights have developed. For exemple, some tables were worked out on the unified sex basis for single annuities under T.I.A.A. If they did unify the tables and keep the same retirement options such as, having the employed spouse covered at a full rate and then two-thirds rate to the other spouse after the employed spouse's death, the women, because of the result of this, would get about a 7% higher pay-out than the men. It is not an easy thing to work out as you go through all these options. As soon as you disregard this fact, that women outlive men, all kinds of artificial adjustments must be made in order to make the thing work.

If the women win, which they probably will, I think, some men will in turn sue because they will be getting lower pay for the same work.

Question: What about lump sum payments? We will make lower contributions for a man than a woman under the equal pension payment program optio.

Visick: Yes. Let's say that your pension plan provides for a lump sum payout. Well, I would go in there, and even though I had worked the same number of years as a woman, I will get a lump sum of say $100,000; the woman would get $135,000, although we both retired on the same day at the same age.

Question: And worked the same?

Visick: And worked the same amount of time.

There is another matter to be considered. If an employer has to provide for equal retirement pay, the company would much rather have a predominantly male work force because the pension contributions would be lower. I can see the insurance companies wanting very much to unload customers who have a predominantly female work force if they are required to provide equal benefits without regard to sex. They are going to want to get out of the business of insuring a predominantly female work force and then you will have litigation.

Question: This affects the entire private sector, not just the academic.

Visick: Yes, this is very much so. It affects everybody who is an employer.

Question: But, Hal, can't you cut the longevity table so many different ways?—The people who smoke pipes longer than those who don't?

Visick: Yes, you can. And there are insurance companies who are prepared to give you different rates based on things like that.

We have mortality tables covering our faculty. I would be willing to bet that our insurer's mortality tables are a great deal different than they would be for the average population because we have a 100% non-smoking, non-drinking group.

I guess the difference is that those tables are based upon empirical facts over time where these government bureaucratic provision are trying to make people equal when they aren't equal. Some people live longer than others, and there's no rational explanation for what they're trying to do that you can statistically verify which would justify a difference in contributions.

The only way I can see that this could work out on a rational basis would be to delay retirement for women, until their life expectancy is roughly that of men, and that would breed chaos in other directions. Well, I think that it is entirely possible that we will have some of our friends go to work on this. This is not something that is subject to lobbying. There are court cases now pending and you can not lobby with judges. But you can file amicus briefs. There are two cases pending in California in the 9th Circuit right now on this subject.

I expect that there will be briefs filed, not only by colleges but by all the other employers who are confused and disturbed by this.

Question: What does it cost to file a brief?

Visick: Well, it depends on the quality of the person you hire and what he charges.

Question: And the complexity of the issue?

Visick: Yes, it could run anywhere from, oh say, $1700 to about $10,000. We filed some in major matters when I was in private practice on which we spent more than $25,000. But we had an interested client who had large sums of money and who could afford to pay. We hired a famous professor from Harvard to write our brief.

Well, this is the sort of area that we certainly are interested in because of its broad public policy implications, not just through our particular sector, but through the entire economy.

WILLS

Question: May I suggest that the members do themselves and the trustees and their institutions a favor? On one specific point you mentioned about the change in the tax law, if you know of donors who have told you that they have your institution in their will, it would be to your and their advantage in my opinion, to tell them that after December 31 of this year, they ought to consider drawing up a new will? Changes in the marital deduction may make this imperative.

Visick: Yes, that applies to certain estates. If you have an estate that is over $500,000 the marital deduction changes will not affect you. Most lawyers I know are contacting clients for whom they have drawn wills and telling them they may want to make changes. I don't really favor the college expressing too much interest in a person's will, to the extent that you give the impression of being interested in him only from a monetary standpoint. But certainly you are doing a service.

I would certainly have my development people continue their educational efforts with respect to wills. I would probably consider having them write a letter to donors that says you ought to be aware that the law has been amended and might affect your will. We might also put it

in our alumni paper or something of that sort.

CONTACT CONGRESS

Question: A second quick suggestion, we always ask you to write your congressman when we want something done. And in the case of tax reform, my hope is that we now would write our congressman and thank them for their help.

Visick: Yes, we don't say thank you often enough.

Question: Well, we wrote to ours and I think everybody should.

Visick: If there is something that should be called to the attention of Congress, this can often be done more effectively by members of your Board of Trustees than it can by the president of the institution, even though he may be very friendly with the congressman. Also, there is strength in numbers—having the trustees write letters to different people also keeps them thinking about their responsibilities at times other than board meetings. Many trustees are influential people who know members of Congress personally and deal with them often. They could contact members casually, which would be invaluable.

The last thing I always bring up, and always remind you, is that if you don't subscribe to a tax law service, you are not getting information you need. I believe that you ought to. We have had Conrad Teitell as a consultant. This man puts out a monthly bulletin and does an awful lot of work for us.

Question: You mean the association as well as your university?

Visick: Yes. And if you are not receiving his service, it is one of the best bargains you can buy. Write TAXWISE GIVING, 13 Arcadia Road, Greenwich, Connecticut, 96870, $16.00 a year.

You may also be interested in Jack Meyer's letters. He is a Washington lawyer with Williams, Meyer and Quiggle. I don't know really what this costs us but Jack mails out a letter irregularly, about once a month or oftener, in which he talks about what is going on in Washington affecting colleges and universities. John Meyers, 888 17th Street N.W., Washington D.C., 20006. It really isn't a commercial service and he doesn't promote it, but if you can get him to send you his letter, it is useful. Conrad Teitell is primarily concerned with charitable giving, whereas Jack Meyer is interested in the whole spectrum of colleges and the government. He represents some of the associations in Washington.

NCAA CASE

Now, with respect to the NCAA case, I think we need to back up a little bit and talk for a moment about Title IX, what it is they are challenging and why it is important to us. What they are challenging is one of the fundamental underpinnings of the Title IX regulations: the idea that if an institution admits a student who is getting government support, the institution itself is receiving government support and all of its programs are subject to government regulation. In other words, it is kind of the old peppercorn argument. If you receive one peppercorn you can be sued on a contract because you received something of value for the promise that you have given. Here, if just one veteran gets veteran's benefits, the HEW says it has the power to regulate every aspect of a university's operations. They are saying that indirect support of that nature is not the same as government support of athletics, and, therefore, intercollegiate athletics are not covered by Title IX regulations. Now this has nothing to do with whether you agree with or disagree with providing increased opportunities in women's athletics. The question is, can the government reach into every corner of an institution based on such an indirect attachment to the activity being regulated.

The NCAA case, therefore, has importance to us. I expect if NCAA loses, we will not be totally lost, but if it wins, it would be a great help to us. We could say to the Federal government, "We have not accepted any of your money, therefore, we are not subject to your regulation." "You cannot control us simply because you have assisted some of our students."

Oaks: May I just break in and say that, if the case were won, one of the immediate benefits is that we could say, for example, even if we receive aid for our chemistry department in the form of a surplus stainless steel counter or a test tube or something, that does not give you a basis for telling us how to run our dormitory. So that the legal doctrine at issue in the NCAA case is usable academically and in housing and in a lot of areas.

Visick: We would like to see, and probably will see, some amicus briefs filed in this case, which would point out the significance of the decision outside athletics. If a chemistry department has a government contract to do research on jet fuels, the NCAA doesn't want the government to claim authority to tell schools how to run athletics. So this point is being raised. The present status of this case is that several groups have intervened, have been admitted as parties to the suit. This includes the women's athletic association, AIAW, and a couple of other interested parties. There are many motions now pending before the court. The government has moved for summary judgment, which mean that they want to have judgment without trial because there is no dispute about the facts and they think the law is in their favor. The AIAW and others have moved to dismiss the case on the technical grounds that the case is moot, or at least it is not ripe yet. The NCAA is moving for a partial summary judgment in the other direction. All of these motions are being briefed and all kinds of material is being filed. They expect that these motions will come up for a hearing about April. This could be the end of the case at that point, either favorably or unfavorably, because the facts are not really in dispute. We should have some kind of an answer on this, at least at the trial level, by that time.

Theberge: Is this something where we could be helpful in filing an amicus brief on the broader educational concerns of the NCAA suit and doing so before April?

Visick: Well, your group has already offered to file one, is that correct? I think there would be some advantage

in our filing our own, and probably we will have to give some serious consideration to that. We ought to get somebody working on it not later than January. I think, personally, it would be very valuable for us to go in, not to argue the pros and cons of the athletic issue, because the NCAA will do that, but what I would like to see is a document, and it doesn't have to be a long one, and it doesn't have to be filled with a lot of legal research, but essentially it says to the court, there are important legal issues involved here that are much broader than athletics. I think the NCAA has some misgivings about our filing a brief, although they are not opposed to it. They are afraid we will muddy up their case and make it more difficult. So we are probably going to have to take a little action on our own. I think we should not hesitate to "muddy up" their case if that is what it takes to show the educational issues. One of the problems with the NCAA is that we cannot depend on them to state educational positions as distinguished from athletic ones. That is one of the issues that university presidents usually have with the NCAA. I, for one, am not deterred by the thought that they think we might confuse the issues.

QUESTION: How did B.Y.U.'s Title IX challenge turn out?

OAKS: We received a letter last summer indicating that in the opinion of H.E.W. our religious exemption covered all of the exceptions we had raised. What that letter meant was that H.E.W. did not want a controversy over Title IX with a church-related university. Whether they will have a contest with a non-church-related institution is an issue yet to be determined. We are all aware of Hillsdale College's position, and I understand they have not yet heard from H.E.W.

QUESTION: Do you see any threats to the independence of our institutions other than government actions?

OAKS: If we were receiving such threats from the business community, we would be equally concerned with threats to our independence from that quarter. In fact, we are not receiving threats from the business community.

I think we do need to be sensitive about interferences with the independence of higher education by accrediting organizations. Normally our accrediting organizations are friendly to higher education, but some of them are now beginning to assume a slightly different role than they have filled in the past. The role they are now assuming is the role of using the coercive power of the accrediting process to promote some particular objective of government or of some other organization. For example, within the past year Brigham Young has had two different accrediting organizations, in this case both at the graduate level rather than the regional accrediting organizations, suggest that if we did not promote a particular government policy, they would put our accreditation in jeopardy. One made this suggestion very tactfully as a recommendation. The other made it a condition of reaccreditation, and shortened the period of the revisit from five years to two years. They implied that unless we had adopted a successful affirmative action program by the time of the revisit we would not get reaccredited. They took no issue with the quality of our degree program. This was simply a case where personnel in the accrediting process disapproved the mix of our faculty and threatened that if we did not do something about it they would not reaccredit us. That poses an issue that Brigham Young University will litigate with the accrediting organization if necessary. I do not think it will be necessary because I believe their request is illegal.

I have deliberately refrained from identifying these accrediting organizations, but I have mentioned the problem because a group that has been concerned in the past almost entirely with government threats to independence needs to be alert to some developing threats to independence from the accrediting organizations themselves.

With proper encouragement, accrediting organizations can be of great assistance. During our recent 10-year reexamination by the Northwest Association, our regional accrediting agency, we raised the issue of independence in our self-study report. We said to the Northwest association, "In your by-laws you say that you are interested in preserving academic freedom. The biggest threat to academic freedom today is government interference with the management of higher education. We therefore challenge your accrediting organization to do something to help protect your constituency from government interference." We were not sure what the reaction of the Northwest Association would be. I am pleased to report that the reaction of the 13-person team that visited us was to commend B.Y.U. on its goals and ideals and to recommend that the College Commission of the Northwest Association commend us and take action to try to keep the government out of the accrediting business and out of our management activities. The College Commission affirmed that recommendation and, in effect, gave us everything we asked in the way of commendation and encouragement.

I have shared this example because I do not want to suggest that the picture is an entirely gloomy one. With the proper kind of impetus and encouragement there are some accrediting groups that are going to be helpful to our cause. But there may be some individual members of accrediting teams not sufficiently familiar with the function of an accrediting team, who may come in and say, "Well, I have a particularly good idea that we want you to follow, and we are going to use the coercive power of the accrediting organization to make sure you do." That we cannot tolerate. I do not care what the idea is, we have to be extremely careful that the coercive power of an accrediting association is not used to abolish a single-sex school, or to prevent somebody else from having a coed school, or to prevent a college from favoring Black students or Chicano students or from pursuing any other responsible educational philosophy.

The educational philosophy should be for the institution to determine. I think that is consistent with the philosophy of this organization, but we have to be very watchful because there are indications that we may soon have an increase of interference from accrediting associations which would have the same kind of homogenizing effect that we are currently resisting at the hands of government.

QUESTION: We might note that the government is also trying to become involved in the accrediting process to a great degree and could be behind some of the events you describe.

OAKS: AAPICU passed a resolution rejecting the idea of government accreditation.*

We are now so close to twelve o'clock, that rather than entertain any more questions I think it would be desirable for us to handle questions individually, so at this point I will declare the annual meeting adjourned.

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*AAPICU Resolution passed December 4, 1976:

WHEREAS, in the judgment of the members of this organization, the accrediting of educational institutions has been carried on effectively for many years by the private, voluntary regional accrediting associations, and

WHEREAS there are indications that the accrediting function which such associations have had may be subject to subordination or usurpation by the Federal Government, and

WHEREAS the accreditation of various specific academic programs or departments by single-purpose accrediting bodies has been multiplying with a consequent burden upon the time of the officers of the institutions under consideration, and

WHEREAS there have been reports from several states that teachers unions have sought to control entry into the teaching profession, thus interposing, de facto, an additional and intolerable form of accreditation,

NOW THEREFORE BE IT RESOLVED THAT the American Association of Presidents of Independent Colleges and Universities affirm its strong support of the regional accrediting associations and its availability to assist those associations in preventing the erosion of their accrediting authority either by the Federal Government or by private organizations.

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